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Supreme Court of the United States

OCTOBER TERM, 2002

EDWIN EDWARDS and
STEPHEN EDWARDS,
Petitioners,

--against--

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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41 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Sixth Amendment right to an impartial, unanimous verdict is violated when a court, after extensive inquiry during the deliberations themselves, dismisses a juror who it knows to be leaning towards acquittal, despite the possibility that the juror's dismissal has been sought (and ultimately granted) because of his views of the evidence.

2. Whether the Sixth Amendment is violated when juror identifying information, including the jurors' names, addresses and places of employment, is withheld from the parties in order to protect the jurors, not from the defendants, but from the media.

3. Whether a court, in considering whether probable cause exists after purging a misleading search warrant affidavit of its misleading content, may retroactively consider materials in making the probable cause determination that were not presented to the judicial officer who issued the warrant.

PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption, the parties to the proceeding below are: Cecil Brown, Andrew Martin, and Bobby Johnson.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND
STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 17

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT IN THE CIRCUITS OVER WHAT TYPE OF INQUIRY MAY BE CONDUCTED DURING DELIBERATIONS WHEN THERE IS AN EFFORT TO REMOVE A DISSENTING JUROR, AND WHAT STANDARDS MUST BE APPLIED BEFORE DISMISSING A DISSENTING JUROR 17

II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT IN THE CIRCUITS OVER THE STANDARDS FOR DETERMINING WHEN A COURT MAY EMPANEL AN ANONYMOUS JURY 24

III. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT IN THE CIRCUITS OVER WHETHER A COURT MAY CONSIDER MATERIALS NOT PRESENTED TO THE JUDICIAL OFFICER IN A WIRETAP OR WARRANT APPLICATION IN DECIDING WHETHER A FRANKS HEARING IS REQUIRED 28

CONCLUSION 30

APPENDIX (see separate volume)

Decision of the Court of Appeals for the Fifth Circuit dated August 23, 2002 (303 F.3d 606) ..... App. 1

Order Denying Petitions for Rehearing and Rehearing En Banc dated September 23, 2002 ..... App. 74

Decision of the Middle District of Louisiana dated January 5, 2001 ..... App. 76

Decision of the Middle District of Louisiana dated July 27, 2000 (119 F.Supp.2d 589) ..... App. 137

Decision of the Middle District of
Louisiana dated August 22, 2000
(124 F.Supp.2d 387) ..... App. 211

Decision of the Court of Appeals for
the Fifth Circuit in United States v.
Brown dated July 15, 2002
(298 F.3d 392) ..... App. 300

TABLE OF AUTHORITIES

CASES

Andres v. United States,
333 U.S. 740 (1948) 22

Franks v. Delaware,
438 U.S. 154 (1978) 28, 29

Johnson v. Louisiana,
406 U.S. 356 (1972) 22

Remmer v. United States,
347 U.S. 227 (1954) 23

Reno v. American Civil Liberties Union,
521 U.S. 844 (1997) 26

Rice v. Wolff,
513 F.2d 1280 (8th Cir. 1975),
rev'd on other grounds, 428 U.S. 465 (1976) 29

Riggins v. Nevada,
504 U.S. 127 (1992) 26

Tanner v. United States,
483 U.S. 107 (1987) 23

The Unabomb Trial Media Coalition,
183 F.3d 949 (9th Cir. 1999) 27

Thompson v. Western States Medical Center,
122 S. Ct. 1497 (2002) 26

United States v. Abbell,
271 F.3d 1286 (11th Cir. 2001),
cert denied, 123 S. Ct. 74 (2002) 20, 23

United States v. Baker,
262 F.3d 124 (2d Cir. 2001) 23

United States v. Barnes,
604 F.2d 121 (2d Cir. 1979),
cert. denied, 446 U.S. 907 (1980) 24

United States v. Bassler,
651 F.2d 600 (8th Cir. 1981),
cert. denied, 454 U.S. 1151 (1982) 4

United States v. Branch,
91 F.3d 699 (5th Cir. 1996),
cert. denied, 520 U.S. 1185 (1997) 25

United States v. Brown,
298 F.3d 392 (5th Cir. 2002) ..... passim

United States v. Brown,
823 F.2d 591 (D.C. Cir. 1987) 19

United States v. Cheyenne,
855 F.2d 566 (8th Cir. 1988) 3

United States v. Crockett,
979 F.2d 1204 (7th Cir. 1992),
cert. denied, 507 U.S. 998 (1993) 24

United States v. Darden,
70 F.3d 1507 (8th Cir. 1995),
cert. denied, 517 U.S. 1149 (1996) 24

United States v. De La Vega,
913 F.2d 861 (11th Cir. 1990),
cert. denied, 500 U.S. 916 (1991) 3

United States v. Geffrard,
87 F.3d 448 (11th Cir.),
cert. denied, 519 U.S. 985 (1996) 18

United States v. Griffith,
756 F.2d 1244 (6th Cir.),
cert. denied, 474 U.S. 837 (1985) 4

United States v. Huntress,
956 F.2d 1309 (5th Cir. 1992),
cert. denied, 508 U.S. 905 (1993) 18

United States v. Mansoori,
304 F.3d 635 (7th Cir. 2002) 25, 26

United States v. Paccione,
949 F.2d 1183 (2d Cir. 1991),
cert. denied, 505 U.S. 1220 (1992) 25

United States v. Reese,
33 F.3d 166 (2d Cir. 1994)
cert. denied, 513 U.S. 1092 (1995) 18

United States v. Ross,
33 F.3d 1507 (11th Cir. 1994),
cert. denied, 515 U.S. 1132 (1995) 24, 25

United States v. Samet,
207 F.Supp.2d 269 (S.D.N.Y. 2002) 23

United States v. Scarfo,
850 F.2d 1015 (3d Cir.),
cert. denied, 488 U.S. 910 (1988) 24

United States v. Speer,
30 F.3d 605 (5th Cir.),
cert. denied, 513 U.S. 1028 (1994) 18

United States v. Steele,
785 F.2d 743 (9th Cir. 1986) 3

United States v. Symington,
195 F.3d 1080 (9th Cir. 1999) 19, 20, 22, 23

United States v. Thomas,
116 F.3d 606 (2d Cir. 1997) 19, 20, 22, 23

United States v. Vigeant,
176 F.3d 565 (1st Cir. 1999) 29

United States v. Weaver,
99 F.3d 1372 (6th Cir. 1996) 29

CONSTITUTION, STATUTES AND RULES

U.S. Const.
Amend. IV 1

Amend. V 2, 22

Amend. VI 2, 17, 22

28 U.S.C. § 1254(1) 1

Federal Rule of Criminal Procedure 23(b) ..... passim

OTHER AUTHORITIES

Abraham Abramovsky & Jonathan I. Edelstein, Anonymous Juries: In Exigent Circumstances Only, 13 St. John's J. Legal Comment. 457 (1999) 24

Thomas Hafemeister, Juror Stress,
41 Advocate 14 (March 1998) 21

Kim Taylor-Thompson, Empty Votes in Jury Deliberations, 113 Harv. L. Rev. 1261 (April 2000) 22

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 303 F.3d 606 (5th Cir. 2002), and is set forth at App. 1. The order denying petitioners' petitions for rehearing and rehearing en banc is not reported, and is set forth at App. 74. The opinion of the United States District Court for the Middle District of Louisiana denying defendant's motion for a new trial is not reported and is set forth at App. 76; the opinion granting the government's motion for an anonymous jury is reported at 119 F. Supp.2d 589 (M.D. La. 2002) and is set forth at App. 137; the opinion denying the defendant's motion to suppress is reported at 124 F. Supp.2d 387 (M.D. La. 2002) and is set forth in App. 211. The opinion of the United States Court of Appeals for the Fifth Circuit in United States v. Brown, a decision adopted by the Fifth Circuit in this case, is reported at 298 F.3d 392 (5th Cir. 2002) and is set forth at App. 300.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on August 23, 2002. (App. 1) Petitioners timely filed petitions for rehearing and for rehearing en banc, which were denied on September 23, 2002. (App. 74) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation,

> and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .

Federal Rule of Criminal Procedure 23(b) provides:

> **(b) Jury of Less Than Twelve.** Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences. Even absent such stipulation, if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors.

STATEMENT OF THE CASE

This Petition raises three important constitutional issues stemming from the trial and conviction of the former four-term Governor of Louisiana, Governor Edwin Edwards. Governor

Edwards and his son, Stephen Edwards, were convicted on May 9, 2000, of RICO, extortion and mail fraud in connection with allegations that Governor Edwards accepted money in exchange for his support of riverboat gambling license applications. (R7688-83, 9819) On January 8, 2001, Governor Edwards was sentenced to a term of imprisonment of 120 months, and Stephen was sentenced to 84 months. (R9848) On August 23, 2002, the Fifth Circuit affirmed the convictions. (App. 1)

1. The first issue raised in this Petition is one that, in recent years, has sharply divided the lower courts. It concerns the standards that a court must apply before dismissing a juror during deliberations when it is clear that the juror has taken a dissenting or minority position. In this case, "Juror 68,"[1] through no fault of his own, came to the attention of the court during the trial when he became the target of a vindictive campaign by former parishioners of his church, who accused him of talking about the case while in church. An inquiry was conducted and the court determined that the accusations were baseless. (C3/21/00/pp.2-50; C4/3/00/p.11; C4/18/00/p.10)

The jury began its deliberations on April 24, 2000. The next day, this same juror mistakenly brought a dictionary and thesaurus into the jury room – a common occurrence and one that rarely, if ever, constitutes grounds for a mistrial.[2] The court had

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[1] The jurors were identified solely by number. Their names and other identifying information were withheld from the parties because of the publicity surrounding the trial. The propriety of that procedure is the second issue raised in this Petition.

[2] See, e.g., United States v. Cheyenne, 855 F.2d 566 (8th Cir. 1988) (dictionary); United States v. Steele, 785 F.2d 743 (9th Cir. 1986) (dictionary); United States v. De La Vega, 913 F.2d 861 (11th Cir. 1990), cert. denied, 500 U.S. 916 (1991) (book

not previously given the jurors an instruction prohibiting them from using a dictionary, and several jurors, including the foreman, thought this was an honest mistake and one that he or she could have made. The court did not question the jurors to determine if they had used the dictionary, or to see if there was any taint. Instead, the court instructed the jurors that they were not permitted to bring in a dictionary, or do "research at home," or bring in any "materials," other than their "notes." (T4/25/00/pp.11-21, 24-43; T5/2/00/p.5, 213)

On the third day of deliberations, April 26, 2000, the jurors sent the court a note indicating that they were not able to "reach an agreement" on "any of what we are working on." The court expressed concern over whether the jury was "hopelessly deadlocked." (C4/26/00/p.2)

The next day, April 27, 2000, Juror 68 came out of the jury room, visibly upset. At the Judge's instructions, he wrote a note, asking whether he had to "explain doubts in [his] mind?" and stressing that he was "being very intimidated because how I may feel." (R7621)[3] Although the note did not mention

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about jury duty); United States v. Bassler, 651 F.2d 600 (8th Cir. 1981), cert. denied, 454 U.S. 1151 (1982) (Robert's Rules of Order). Indeed, in United States v. Griffith, 756 F.2d 1244 (6th Cir.), cert. denied, 474 U.S. 837 (1985), the Judge's own law clerk furnished the jury with a dictionary, illustrating that someone well-versed in courtroom procedure may be mistaken about what is allowed.

[3] The note reads as follows:

"Very confidential. Please!

Do I have to explain doubts in my mind? #68

I am being very intimidated because how I may feel, can we say.

Could this have been what it was (evidence) or

religion, the government immediately moved for his dismissal, claiming that the juror, who was known to be a member of a Pentecostal Church, had religious beliefs that precluded his rendering a verdict. The court did not engage in any inquiry to determine the nature of the intimidation, but instead sent the jury back for further deliberations. (C4/27/00/p.44-113)

There was another full day of deliberations. On May 1, 2000, a few jurors penned a note that said that a juror was "biased," was "refus[ing] to participate in deliberations," and had "his mind made up." (R74646)[4] At that point, the court halted deliberations and brought the foreman in for four separate interviews. The foreman told the court that the target of the note was Juror 68, that he was deliberating and was not biased, although he had some trouble communicating his views, but that there was a "stalemate"– that Juror 68 "will only state his

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could it not have been, With statements that were made during the whole trial. I feel there is such an awesome responsibility with the lives of people in our and my hands that I am trying to errase (sic)some doubts but can't seem to forget them in my mind. If my feelings or thoughts which are seemingly to be affecting the process or the majority of feelings, of others, as much as I do not want to request it; I would request to be dismissed.

Please do not let this note get out into the public. Please Confidential (R7621)

[4] This note read as follows:

CONFIDENTIAL We feel a certain juror is biased and refuses to participate in deliberations. He has his mind made up, but will not discuss his reasoning. After many, many attempts by ALL jurors he still refuses. And has recently gone as far as to tell a fellow juror to not speak to him at all. We do not know how to proceed with this juror's refusal to participate in deliberation. (R7646)

opinion in one direction," and had insisted that **"this is my opinion and I have got a right to it."** (T5/1/00/p.269, 273-82, 291) In the third interview – conducted over vigorous objection since it was clear that Juror 68 was deliberating, that the issue centered on Juror 68's view of the evidence, and that Juror 68 could continue to discharge his duties – the foreman mentioned, almost as an afterthought, that some jurors had seen some incidents involving Juror 68 bringing papers into the juror room. (T5/1/00/p.23)

After the foreman's third interview, the court suddenly remembered two other "incidents" involving Juror 68 that the court had not considered significant at the time. The jurors were provided with notebook binders in which they kept their personal notes. In addition, they were handed binders containing transcripts of wiretaps, and, on occasion, loose transcripts of wiretapped conversations. Both set of binders and the loose transcripts were handed out and picked up out the end of each day. They never left the courtroom, and were often placed on the floor and then retrieved by the clerk. Several jurors "doodled" or made notes in the transcript binders, and, at some point during the trial, the court asked the jurors not to do so. In the first "incident," Governor Edwards had been handed a transcript binder that had the number "68" written on it. No one knew when the number was put on the binder, and no one questioned that it was the inevitable consequence of the daily recycling of binders and of the confusion engendered by having multiple binders with inconsistent instructions on how to mark then.[5] In the second incident, unbeknownst to anyone but the Judge and his clerk, a loose transcript fell out of Juror 68's notebook one evening when the clerk was collecting the notebooks for the

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[5]A much more serious transgression took place during deliberations, when the jurors were inadvertently furnished a binder that contained the government's markings. Nothing was made of this "incident."

night. (T5/1/00/pp.294-95) These incidents were considered so trivial at the time, Juror 68 was never questioned about either one, and, until the incidents were mentioned by the Judge and become a basis for Juror 68's dismissal, the defense had no inkling that they would ever be considered significant.

The next day, while deliberations remained suspended, the foreman was brought back in for further questioning. He openly disclosed matters that took place during the deliberation process, revealing that Juror 68, after deliberating one day, on the next day decided to change his vote, which the foreman opined was "odd." (T5/2/00/p.104) He admitted that Juror 68 was not intimidating other jurors and acknowledged that he did not think there was anything improper about bringing in the dictionary – that he "could have done the same thing." (T5/2/00/p.105) And he again mentioned that Juror 68 supposedly brought a "little yellow paper" into the juror room and, "during a part that was kind of not going well in deliberations," took some sheets out of his notebook and brought them into the bathroom, where he stayed about three to five minutes. (T5/2/00/pp.103-07)

Juror 68 was then called in and shown the note, which he (any many other jurors) had not seen. (T5/2/00/p.156) Juror 68 made it absolutely clear that the disagreement with some of his colleagues stemmed from his view of the evidence. As he put it:

> Based upon everything that was given to us, the evidence that we have heard, seen, and charges that you have given to us, and instruction that you have given to us, when I took an oath to be a juror, right then and there, actually, before that, I have not been biased, prejudiced, I haven't taken sympathy towards anybody as far as my opinion. The charges you gave us and the instructions you gave us, maybe I'm taking it way too serious, I don't know. Maybe I am. Maybe I'm interpreting it – some of the instructions wrong,

because I'm not knowledgeable as far as to legal terms, and items like that. I've just – I've depended a lot on what you told us, or what I understood you to say in the instructions, to put as much weight, or as little weight on whatever that you've give to us, and that we've received during the trial. And this may be wrong. I don't know, but I've depend a lot on one thing to help me make a decision, and that's been my conscience. And I can't apologize for that, and that's all I can say.

And if I'm wrong, you know, I've really, really would appreciate some guidance if I should not go by my conscience and how I feel. I would really appreciate it. But because – I'm sorry - but because I may have a disagreement, or I may not agree with somebody else's view or opinion, I may not, I am not going to criticize their opinion. I'm not going to tell them that they are biased or prejudiced. And I just hate that it's happened to me, and I guess that's what the note was about yesterday.

As far as I know, there were very few of us that were even – we even had knowledge of the note. But I can't apologize for my conscience, you know, and what I feel. That's the one thing I think I've had to help lead me in this. And up until right this moment, I still am not, or have not been swayed or persuaded by anybody else in this world, I can promise you that.

(T5/2/00/p.159-60)

Juror 68 apologized for bringing in the dictionary and thesaurus, explaining that he had not realized it was improper.

He told the court that several jurors had looked up certain words, but that after the court instructed the jurors that they could not use the dictionary, none of the jurors used the dictionary definitions in the deliberations. (T5/2/00/pp.162-166)

The Judge asked Juror 68 a series of ambiguous questions about whether he had brought any "notes, papers, books, charts or whatever" into or out of the jury room. Twice the Judge asked the juror if he had brought "any other notes into the jury from **home**," or whether he had brought any materials out of the jury room "**home** with him." (T5/2/00/pp.164-65) Since, up to this point, the questioning had focused on the dictionary brought in from **home**, the questions could be interpreted as asking whether the juror had brought in or taken **home** any other materials. Juror 68 responded that he only had brought in a bag with medicine. (T5/2/00/pp.164-67)

At one point during this extended interrogation, Juror 68 told the Judge that the repeated questioning of him was causing the other jurors to question what was "going on," advising the Judge that the other jurors believed that the court's persistent questioning of him meant he "had been influenced." As he told the Judge, "when I was out of the jury room the other day, there was a juror that took it upon himself to announce that to every one of the jurors." (T5/2/00/pp.166-67) He was also asked whether he had any religious beliefs that would preclude him from following the court's instructions, to which he replied, "No sir." (T5/2/00/p.168-84) And when asked whether he had been "intimidated or pressured by anyone," he said, **"yes sir. I have been strictly because I feel like it's my feelings and how I've chosen to vote on an issue or a charge."** (T5/2/00/pp.183-84) After the interview was concluded, the Judge commented that **"I think he [Juror 68] was very frank and open."** (T5/2/00/p.186)

Each of the jurors was then brought in for a separate interview. Some mentioned having seen Juror 68 bring a piece

of paper into the juror room, or bring some blanks sheets of paper out into the adjoining bathroom that was part of the secure jury area, although no one knew what was on any of these papers. Some revealed that the jurors were discussing Juror 68 among themselves, perhaps fueling the efforts to have him dismissed. One juror admitted to bringing in magazines, a violation of the court's explicit instructions. Another expressed outright frustration over the length of deliberations, since he had a job interview coming up. One juror said he was "pretty suspicious of [Juror 68's] votes" and that the other jurors had "just tried to explain [to him] that eleven other people . . ." but Juror 68's "mind was already made up." And, most importantly, many jurors displayed open hostility towards Juror 68 because, after this four month trial, he was impeding a verdict. (T5/2/00/pp.199, 202-03, 212-13, 237-38, 246-47, 255, 264-65)[6]

The next day, Juror 68 was brought back in and immediately volunteered that, after "rack[ing] [his] brain" to "think what could [he] have possibly done," he recalled that, on one occasion, while on the marshal's van on the way into court, he had jotted down a question ("the little yellow paper") he "had on [his] mind" and, on another day, during a particularly tense period of deliberations, he had brought some blank sheets of paper into the adjoining bathroom that was part of the secure jury area to write down his wife and son's names, as a means of calming his nerves (the other incident mentioned by some of his fellow jurors). He offered to show the court the question, which was still in his wallet, and said the sheets of paper with his wife and son's names written on them were still in the jury room. (T5/3/00/pp.42-45) The court, however, chose not to look at

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[6] There were suggestions during the questioning that Juror 68 was not alone, and that others, albeit a minority of jurors, might have agreed with him, or at least have been undecided. Those jurors could not help but be influenced by the trial court's repeated questioning of and about Juror 68.

them to confirm whether Juror 68's account was true, and instead discredited Juror 68's uncontradicted account of what the alleged "notes" contained.[7]

Over objection that the process itself was tainting the deliberations, the court then conducted two additional days of hearings, taking testimony from members of Juror 68's church, including his Pastor, purportedly to revisit the discredited allegations made during the trial. (T5/3/00 pp.50-237; T5/4/00 pp.4-37) Throughout this extended process, the government, acknowledging that Juror 68 was not "great" for the government, vigorously argued for his removal. (T5/3/00/p.301)

Finally, on May 5, 2000, four days after the court halted deliberations to conduct an investigation of this one dissenting juror, and a full two weeks after deliberations had begun, Juror 68 was dismissed. The trial court concluded that he had failed to follow instructions and had not been candid with the court when, in his initial interview, he had not mentioned the question he had scribbled on the way into court, or the blank sheets of paper on which he had written his wife and son's names. (T5/5/00/pp.24-51) (App. 99)

The Fifth Circuit affirmed. In a decision that is in conflict with recent decisions rendered by several other Circuits, the Fifth Circuit held that, pursuant to Rule 23(b) of the Federal

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[7] The Fifth Circuit later mischaracterized the evidence, criticizing the juror for keeping the note in his wallet "contrary to the court's instructions." (App. 40) There was never an instruction that prohibited a juror from writing down a question so as not to forget it. Moreover, had the trial court accepted Juror 68's invitation to review the note, it would have conclusively established whether the note was something sinister, as suggested, or just a "question," as Juror 68 maintained.

Rules of Criminal Procedure, a juror may be dismissed during deliberations if the lower court articulates reasons that, on their face, do not refer to the juror's view of the evidence, even if the record reflects that the juror's removal was sought because of his view of the merits of the case.[8] The Fifth Circuit concluded that the nature of any juror inquiry conducted during deliberations, and the motivation for the efforts to remove a juror, are not relevant considerations in evaluating whether the trial court has abused its discretion in dismissing a deliberating juror. (App. 44-46) In other words, in the Fifth Circuit, a trial court may now eliminate a deadlocked jury if it articulates plausible, objective grounds for dismissing the dissenting juror, even if the record reflects that the juror would never have been dismissed on those grounds had his status as a "hold-out" not been revealed.

2. The second issue raised in this Petition concerns the propriety of empaneling an anonymous jury in order to protect the jurors from the media. The district court, sua sponte, first mentioned an anonymous jury at an early status conference, and later issued an order directing "any party that desires to request an anonymous jury" to do so by a set date. (R1991; T6/23/99) Having twice been invited to do so, the government sought an anonymous jury, claiming, primarily, that the trial would engender enormous publicity and potentially subject jurors to harassment. (C3/10/99/p.57;R1996,2202; T6/23/99; T9/17/99/pp.11-32, 42-43) The defendants, arguing that anonymous juries were inherently prejudicial, suggested alternative measures that would protect the jurors from the media without prejudicing the defense – in particular, withholding juror

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[8] The Fifth Circuit relied on the trial court's findings relating to the juror's alleged lack of candor, and to the "dictionary incident," the "binder and notebook incidents," and to the question jotted down on the way into court and the blank sheets of paper taken into the adjoining bathroom, referred to as the "note incidents." (App. 38, 39, 42)

identifying information from the media, but providing it to the parties.

Despite the availability of less prejudicial alternatives, on the eve of trial, the court granted the government's motion, without opinion, and ordered that the issue "not be discussed publicly or in open court." (R5754)[9] Pursuant to its ruling, the court withheld from the defendants and their attorneys the names, addresses and places of occupation of the jurors and their spouses. (R8553)

As feared, the inability to identify the jurors prejudiced the defense. The media reported that anonymous juries are used only when the defendants pose a threat to the jury, and that, for this unusual measure to be employed, the government must have evidence that Governor Edwards posed a threat to juror safety or integrity. (R3041/Exh.A) In addition, the withholding of juror identifying information had real consequences in this case. At the end of the trial, the defense learned that, unbeknownst to the defense, a juror knew Stephen Edwards's in-laws and had made

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[9] Defendants unsuccessfully sought unsealing of the anonymous jury papers and opening of the proceedings because the press, which was aware of the bare-bones, publicly filed motion, but was not given access to the papers which set forth the basis for the motion, was speculating that the government had evidence that Governor Edwards posed a threat to jurors. (R3039, 3047) The district court ruled that total closure was required to protect "the fair trial rights of both the defendants and government," and because "widespread publicity of the defendants' arguments opposing the anonymous jury could encourage the public and potential jurors to associate inaccurate motives with the government's motion." (R4074-73) The Fifth Circuit affirmed, holding that, despite defendants' objections, total closure was an appropriate remedy to protect the defendants from press coverage of the proceedings. (App. 15)

negative comments about Governor Edwards in the past. (T5/10/00/p.2; T5/11/00/pp.6-7) This juror had indicated on an initial questionnaire submitted to the trial judge, but withheld from defense counsel, that she had known "Mrs. Stephen Edwards' mother and grandmother all of [her] life." (Juror Questionnaire #1/Juror 370) But in the questionnaires provided to the defense, and during voir dire questioning, the juror falsely indicated that she had no connection with Stephen Edwards. (Juror Questionnaire #2/Juror 370; T1/10/00/p.53) Thus, the defense, unaware of the woman's name or of her personal animus, did not move to dismiss her for cause, or exercise a peremptory challenge to eliminate her from the jury panel.[10]

On appeal, the Fifth Circuit affirmed. In a break with precedent, the Fifth Circuit held that an anonymous jury may be employed, even if the defendants or their associates do not themselves pose a risk to juror safety or integrity, if the trial court determines that anonymity is warranted to protect the jurors from the media. (App. 8-11)

3. The third issue raised in this Petition concerns what a court may consider in determining whether to hold an evidentiary hearing when an affidavit in support of a search warrant or wiretap application is false and misleading. Here, wiretaps were obtained based on information provided to the government by Patrick and Michael Graham – two con men with a long criminal

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[10] This same juror revealed her bias during the trial, sending the court a note unfairly criticizing the courtroom conduct of Governor Edwards's wife. Although not central to this petition, this Court may want to consider whether it is ever appropriate to deny the defense access to juror background information that is provided to the court. This case illustrates how providing the information to the court, but not to the defense, restricts the usefulness of the information since the court, as here, may not appreciate its significance.

history of deception and manipulation. In the affidavit in support of the wiretap application, as well as in all subsequent affidavits, the government falsely represented that its "confidential witness" (Patrick Graham) was reliable. In fact, the government knew full well that the Grahams were anything but reliable. Indeed, during the same period of time, in bankruptcy court in Texas, the government had characterized these men as "the most manipulative con men probably in the face of the world," and had revealed that "the things that we're not able to independently corroborate, we believe are lies, and that is the way it has to be when you deal with the Grahams." (R3616; R3618/Exh. 2; T8/16/96/pp. 30,42)

The affidavit in support of the wiretap applications contained other misrepresentations and material omissions. It did not disclose: (a) the extent of the confidential informant's criminal history; (b) that the federal prosecutors in Texas had refused to deal with the Grahams because of their lack of reliability; (c) the favorable deal the Grahams had obtained from the Louisiana federal prosecutors; or (d) that the Louisiana prosecutors had constructed a "Chinese Wall" to protect them from learning of the Grahams's criminal activities in Texas, which they then might be required to disclose in a wiretap application in Louisiana. And the affidavit substantially misrepresented the content of consensual recordings made by Graham, purportedly to corroborate his story. Most notably, the affidavit included the following excerpt of a conversation between Graham (the "CW") and another individual, defendant Cecil Brown:

> CW:... Ah, I want EDWIN to be comfortable, okay? I can't afford anything to go wrong with this deal. All right? So we've got to get him, whatever that portion is covered first . . . .
>
> Brown: Yeah.

(R3618/Exh.5/Cleveland aff't/¶30) The excerpt suggests that Brown was acknowledging that the CW had to "get him," that is Governor Edwards, "covered first." In fact, the full exchange, without the ellipsis, and including the very next statements made by Brown, reflects an unequivocal denial by Brown that any money is going to Governor Edwards. The full passage, with the omitted portions underlined, is as follows:

> CW: Ah, I want EDWIN to be comfortable, okay? I can't afford anything to go wrong on this deal. All right? So we've got to get him, whatever that portion is covered first. All I want to do is drag you out and I'm not gonna drag you out more than 90 days.
>
> Brown: Yeah.
>
> CW: I just don't . . . ah, you know, you never have told me what the . . .the . . . the sharing ratio is.
>
> Brown: He doesn't get any. I get it all. I want half right away.

(R3544; R3618/Exh. 7/T5/8/96/p.3)

The defendants moved to suppress the evidence obtained as a result of the wiretaps. The district court denied the motion. (App. 211-99) The Fifth Circuit without any analysis of the issue, affirmed, relying on United States v. Brown, 298 F.3d 392 (5th Cir. 2002), a decision in another appellate case involving the same wiretap applications.[11] There were three opinions in

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[11] Neither Governor Edwards nor Stephen Edwards was an appellate party in Brown and neither had an opportunity to brief the issue in Brown.

Brown, two of the Justices determining that the wiretap affidavit was false and misleading. (App. 326, 335-39) All three Justices, however, relying extensively on material that was not provided to the judicial officer who had granted the wiretap authorization, held that, even if the affidavit was purged of its misleading representations and omissions, there was probable cause to support the warrant. (App. 309, 326, 340) The Brown decision did not address the propriety of a reviewing court relying on materials that had not been presented to the issuing judicial officer, although it was a major issue in this case.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT IN THE CIRCUITS OVER WHAT TYPE OF INQUIRY MAY BE CONDUCTED DURING DELIBERATIONS WHEN THERE IS AN EFFORT TO REMOVE A DISSENTING JUROR, AND WHAT STANDARDS MUST BE APPLIED BEFORE DISMISSING A DISSENTING JUROR

The first issue raised in this Petition goes to the heart of the federal criminal justice system and to the role of the court in ensuring that efforts to prevent a deadlock do not undermine the constitutional mandate of unanimity. It is an issue that has taken on extraordinary importance in recent years as courts have increasingly confronted the dismissal of dissenting jurors. The Petition asks: (a) whether Federal Rule of Criminal Procedure 23(b), which authorizes a verdict by 11 jurors when there is "just cause" for dismissing a juror, may be used to remove a capable but dissenting juror for "misconduct" that would not provide grounds for a mistrial or for removal of the juror if his role in deadlocking the jury was not known; and, (b) if so, whether allowing an 11 person jury under those circumstances violates a defendant's Sixth Amendment right to an impartial and unanimous verdict.

The lower courts have grappled with the meaning of "just cause," under Rule 23(b). As the Advisory Committee Notes explain, Rule 23(b) was intended to cover the rare situation where "after the jury has retired to consider its verdict and any alternate jurors have been discharged, one of the jurors is seriously incapacitated or otherwise found to be unable to continue service upon the juror." (Emphasis added) Based on this Rule, the district courts have dismissed jurors who have become unavailable, who are impaired due to mental or physical illness, or who otherwise are unable to render a verdict.[12]

In those cases, the Rule serves a salutary purpose – allowing a trial to proceed to verdict despite the often unforeseeable inability of one juror to continue with his or her duties. Recently, however, the lower courts have faced a far more complex problem and one on which the courts have not agreed – namely, how a court is to proceed when there are allegations by fellow jurors that one juror, inevitably a dissenting or minority juror, is "refusing to deliberate." There is now a clear conflict in the Circuits over the standards the court must apply in reviewing an objection to the dismissal of a "hold-out" juror, over whether the motivation behind the request for dismissal is relevant, and over what type of inquiry may be conducted during the deliberation process when other jurors

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[12] See, e.g., United States v. Huntress, 956 F.2d 1309 (5th Cir. 1992), cert. denied, 508 U.S. 905 (1993) (juror failed to disclose psychiatric problems and entered the hospital during deliberations, threatening suicide); United States v. Reese, 33 F.3d 166, 172-73 (2d Cir. 1994), cert denied, 513 U.S. 1092 (1995) (juror leaving on business trip); United States v. Speer, 30 F.3d 605 (5th Cir.), cert. denied, 513 U.S. 1028 (1994) (inability to understand or communicate in English); United States v. Geffrard, 87 F.3d 448, 451 (11th Cir.), cert. denied, 519 U.S. 985 (1996) (juror admitted that her religious beliefs prevented her from returning a guilty verdict).

complain about a fellow juror's supposed unwillingness to engage in deliberations.

The Second, Ninth and District of Columbia Circuits have agreed that it is improper, indeed, unconstitutional, to discharge a juror if there is even a possibility that the juror's dismissal was prompted by the juror's doubts about the defendant's guilt. United States v. Brown, 823 F.2d 591, 596 (D.C. Cir. 1987) ("if the record evidence discloses any possibility that the request to discharge stems from the juror's view of the sufficiency of the government's evidence, the court must deny the request"); United States v. Thomas, 116 F.3d 606, 622 (2d Cir. 1997) ("adopting the Brown rule as an appropriate limitation on a juror's dismissal"); United States v. Symington, 195 F.3d 1080, 1087 (9th Cir. 1999) ("if the record evidence discloses any reasonable possibility that the impetus for the juror's dismissal stems from the juror's views on the merits, the court must not dismiss the juror"). These Courts, sensitive to how the majority may become frustrated when one or a few jurors are impeding a verdict, have held that the reason prompting the request for dismissal is a critical factor in evaluating the propriety of the juror's dismissal. In Symington, for example, the Ninth Circuit observed that, while there may have been legitimate concerns about the dismissed juror's abilities, "there was also considerable evidence to suggest that the other jurors' frustrations with her derived primarily from the fact that she held a position opposite to theirs on the merits of the case," and that those frustrations "manifest[ed] themselves in concerns about [her] reasonableness or general capacity as a juror." 195 F.3d at 1088.

The Second, Ninth and D.C. Circuits also have curtailed the power of the district court to engage in inquiry during the deliberation process. As the Second Circuit has explained, "once a jury retires to the deliberation room, the presiding judge's duty to dismiss jurors for misconduct comes into conflict with a duty that is equally, if not more, important – safeguarding the secrecy of jury deliberations." Thomas, 116 F.3d at 618. Thus, any

inquiry must be limited to questions relating to the juror's capacity to render a verdict, must never relate to the substance of deliberations, and must not, itself, taint the deliberative process.

The standard adopted by the Second, Ninth and District of Columbia Circuits is an objective one: inquiry must cease once it becomes apparent that there is a reasonable possibility that the juror is being challenged because of his view of the merits of the case. In contrast, recently, the Eleventh Circuit, in United States v. Abbell, 271 F.3d 1286 (11th Cir. 2001), cert denied, 123 S.Ct. 74 (2002), held that a district court may dismiss a dissenting juror unless the record demonstrates a "substantial possibility" that dismissal stemmed from the juror's view of the evidence. Id. at 1302. Unlike the Second, Ninth and D.C. Circuits, the Eleventh Circuit countenanced a subjective and extended inquiry into the jurors's views during the deliberative process, and then approved of a lower court's subjective determination to credit the majority that the dissenting juror would not abide by the law, although there was undeniably a "possibility" that the juror's dismissal was sought because of her view of the evidence. Id. at 1303-04.

In this case, the Fifth Circuit has flatly rejected the Brown/Thomas/Symington approach, and has gone even farther than the Eleventh Circuit in allowing a district court virtually unlimited discretion to conduct a broad juror inquiry during deliberations. According to the Fifth Circuit, Brown/Thomas/Symington and Abbell dealt only with potential juror nullification, and the rule announced in those cases would apply, if at all, only when the juror was accused of failing to follow the law. (App. 44-45) Here, of course, Juror 68 was not refusing to follow the Judge's instructions on the law. Indeed, he made a passionate statement about his commitment to abide by the court's instructions and to render a verdict in accordance with his conscience, based on the evidence presented. Under those circumstances, under the Fifth Circuit approach, a rigorous review of the grounds for his dismissal was not warranted.

Instead, an extremely lax "abuse of discretion" standard governs because, although the accusations against Juror 68 were prompted by allegations that he "refused to deliberate," Juror 68 ostensibly was dismissed for conduct unrelated to the initial accusations – bringing in the dictionary, writing a question on a piece of paper while on the way into court, and scribbling his wife's name on a blank sheet of paper.

None of this conduct, trivial by any standard, rendered Juror 68 incapacitated or incapable of rendering a verdict – the standard contemplated by Rule 23(b). Indeed, none of the conduct even violated any explicit jury instruction. Nevertheless, according to the Fifth Circuit, even if it is apparent that a juror is leaning towards acquittal, the district court is accorded virtually unfettered discretion to dismiss that juror based on a technical claim that the juror is not following instructions about the process of deliberations.[13]

Moreover, in the Fifth Circuit, unlike its sister Circuits, the motivation underlying the request for the juror's dismissal is not "in any manner controlling," provided the lower court, as it did here, has articulated a justification for the dismissal that on its face appears unrelated to the juror's view of the evidence. (App. 46) In essence, the Fifth Circuit's opinion invites judges to resolve deadlocks by finding objective and plausible grounds for dismissing the dissenting juror, even if the same alleged "misconduct" would never provide grounds for reversal if the

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[13] Jurors are under enormous stress and often deviate from the technical instructions governing their conduct during trial and deliberations. For example, jurors might "doodle," even though they are prohibited from taking notes, or may "vent," when they are forbidden from talking among themselves about the case. Thomas Hafemeister, Juror Stress, 41 Advocate 14 (March 1998).

defense sought the juror's dismissal.[14]

Finally, unlike the Courts in Brown/Thomas/Symington, which held that inquiry must cease once there is even a hint that the dispute centers on the juror's view of the evidence, the Fifth Circuit has placed no limit on the trial judge's authority to conduct inquiries during deliberations, even when, as in this case, it is clear that the inquiry itself is impacting on the deliberative process and creating the impression that the court is siding with the majority. (App. 47-48)

Whether derived from the Due Process Clause of the Fifth Amendment or the Sixth Amendment right to trial by jury, unanimity is "one of the indispensable features of a *federal* jury trial," Johnson v. Louisiana, 406 U.S. 356, 369-70 (1972) (Powell, J., concurring); see also Andres v. United States, 333 U.S. 740, 748-49 (1948). "When verdicts must be unanimous, no member of the jury may be ignored by others." Johnson, 406 U.S. at 396 (Brennan, J., dissenting). Recent research into jury decision-making has confirmed the wisdom of the historic unanimity requirement, revealing that non-unanimous decision-making both alters and diminishes the quality of the deliberative process, encouraging quicker verdicts with less collaborative effort, and minimizing the role of minorities on the jury panel. Kim Taylor-Thompson, Empty Votes in Jury Deliberations, 113 Harv. L. Rev. 1261 (April 2000). These are serious concerns that should be considered before the scope of Rule 23(b) is expanded, as it has been in this case, beyond its original, limited, conception.

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[14] Undoubtedly, trial judges have an incentive to achieve a verdict; a "hung jury," whether the majority is leaning towards conviction or acquittal, is inefficient, and may be perceived as a sign that the judge somehow has failed in his or her duties.

Moreover, crucial to securing the jury trial right is safeguarding the secrecy of jury deliberations. As this Court has written, "the integrity of jury proceedings must not be jeopardized by unauthorized invasions." Remmer v. United States, 347 U.S. 227, 229 (1954). See also Tanner v. United States, 483 U.S. 107 (1987). Allowing a district court to halt deliberations and to conduct a four-day investigation of a particular juror, without regard to its impact on the deliberative process, undermines this principle.

This Court has never addressed the constitutionality of Rule 23(b), or the standards for determining what constitutes "just cause," or what type of inquiry may be engaged in when allegations of misconduct surface during deliberations. The last three years alone have produced five conflicting appellate decisions involving these questions.[15] The Fifth Circuit's opinion in this case has only added to the confusion.

The conflict on the proper application of Rule 23(b) should be resolved by this Court. Criminal defendants should not be subjected to different standards depending on where their trial is held, and jury panels should not be subjected to different levels of judicial intrusiveness depending on nothing more than their location.

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[15] In addition to Thomas, Symington, Abbell, and Edwards, in United States v. Baker, 262 F.3d 124 (2d Cir. 2001), the Second Circuit reaffirmed its holding in Thomas, although it upheld the dismissal of a juror who had acknowledged to the trial court that she had her mind made up before deliberations and refused to deliberate shortly after deliberations had begun. Recently, a District Court in New York, applying Thomas, declared a mistrial, even though the challenged juror indicated that she could not render a verdict, because the controversy was prompted by the juror's views on the merits of the case. United States v. Samet, 207 F.Supp.2d 269 (S.D.N.Y. 2002).

Dismissal of a deliberating juror who is leaning towards acquittal following an extended investigation of that juror and questioning of all of the jurors, all while deliberations have been suspended, goes to the very heart of due process and to the reasonable doubt and unanimity requirements. The dissenting juror, celebrated in such works as "Twelve Angry Men," personifies the ideal that no one should be convicted if even one juror entertains reasonable doubts about the government's case. How that ideal is to be protected is a matter of exceptional importance. The cases are already in conflict, and the issue should be reviewed by this Court.

II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT IN THE CIRCUITS OVER THE STANDARDS FOR DETERMINING WHEN A COURT MAY EMPANEL AN ANONYMOUS JURY

Anonymous juries are a recent development in the law. Until the 1979 trial in the Southern District of New York of Leroy "Nicky" Barnes, an alleged drug kingpin with a violent history, anonymous juries were unknown. Abraham Abramovsky & Jonathan I. Edelstein, Anonymous Juries: In Exigent Circumstances Only, 13 St. John's J. Legal Comment. 457 (1999). The Second Circuit's approval of the District Court's decision to empanel an anonymous jury in United States v. Barnes, 604 F.2d 121 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980), involving serious threats of witness intimidation, led to the use of anonymous juries in numerous cases involving organized crime defendants. See, e.g., United States v. Darden, 70 F.3d 1507 (8th Cir. 1995), cert. denied, 517 U.S. 1149 (1996); United States v. Ross, 33 F.3d 1507 (11th Cir. 1994), cert. denied, 515 U.S. 1132 (1995); United States v. Crockett, 979 F.2d 1204 (7th Cir. 1992), cert. denied, 507 U.S. 998 (1993); United States v. Scarfo, 850 F.2d 1015 (3d Cir.), cert. denied, 488 U.S. 910 (1988).

Although the lower courts have approved anonymous juries when "there is strong reason to believe the jury needs protection," United States v. Paccione, 949 F.2d 1183, 1192 (2d Cir. 1991), cert. denied, 505 U.S. 1220 (1992), the courts have recognized that withholding juror identifying information from the defense raises serious constitutional concerns. Anonymous juries impact on a defendant's due process right to a presumption of innocence, depersonalize the jurors, and interfere with meaningful voir dire. Perhaps most importantly, they are inherently prejudicial, communicating to the jurors, who are aware that their identities are being shielded, that the defendants somehow pose a risk to their safety. United Sates v. Mansoori, 304 F.3d 635, 650 (7th Cir. 2002); Ross, supra.

Because of these constitutional concerns, until this case, anonymous juries were considered an "extreme measure," United States v. Mansoori, 304 F.3d at 649, to be employed only when the defendants, through their own conduct, created the need for the remedy. In this case, the Fifth Circuit, breaking with precedent, held that it is appropriate to withhold juror identifying information from the defendants, even though the case did not involve organized crime or defendants who otherwise posed a danger to the jury, because the case was a high profile case, and the lower court saw a need to protect the jurors from the media. As the Fifth Circuit acknowledged, "**the overriding concern, and the most important factor in the district court's analysis was the intense media interest and highly charged emotional and political fervor that surrounded the trial.**" (App. 9)[16]

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[16] The Fifth Circuit had previously indicated that it might be acceptable to use an anonymous jury in a high profile case. In United States v. Branch, 91 F.3d 699 (5th Cir. 1996), cert. denied, 520 U.S. 1185 (1997), involving the trial of the Branch Davidians, an anonymous jury was also employed, in part, to protect the jurors from excessive publicity. But there, unlike here, the defendants were charged with crimes of violence, and

The decision of the Fifth Circuit, authorizing the withholding of juror identifying information whenever there is likely to be intense media interest in a case, is in conflict with the decisions of its sister Circuits, which have limited the use of anonymous juries to situations where the jurors are at risk from the defendants themselves. The conflict was made glaringly apparent within days of the decision in this case when the Seventh Circuit, in Mansoori, supra, held that it was an abuse of discretion to order an anonymous jury, even in a case involving organized crime defendants, where there was no evidence that the individual defendants posed a threat to the jurors.

The use of a remedy that unfairly impacts on the defendants's constitutional rights, when the concern stems from the media, and not the defendants, despite the availability of less prejudicial alternatives, is contrary to well-established constitutional principles that require a court to consider less intrusive alternatives when constitutional rights are balanced against societal needs. See, e.g., Thompson v. Western States Medical Center, 122 S. Ct. 1497 (2002); Reno v. American Civil Liberties Union, 521 U.S. 844, 846 (1997); Riggins v. Nevada, 504 U.S. 127 (1992). Withholding juror identifying information from the press, but providing it to the parties, would accomplish the court's goal of protecting the jurors without burdening the defendant's rights, and would not send the jurors a prejudicial signal that the court thinks that the defendants are dangerous

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the Court recognized that the case "aroused deep passions." Id. at 724. Thus, there was some perceived risk to the jury from the defendants and their supporters. This was a political corruption case, nothing more. While Governor Edwards had his supporters and detractors, his trial did not "arouse deep passions" posing a threat of violence.

people.[17] Yet the Fifth Circuit held that the jurors' privacy interests "trumped" the defendants' constitutional rights.

Although the use of anonymous juries has proliferated in recent years, this Court has not yet addressed the constitutionality of withholding juror identifying information from the parties. Certainly, whether media attention alone justifies that drastic measure, despite the prejudice to the defendants, is an important question that this Court should review. Increasingly, many cases, whether they involve allegations of murder, or kidnaping, or political corruption, or corporate crime, generate enormous media attention. The defendant often has little or no control over whether his trial will become the subject of a media frenzy. Whether the defendant will have the benefit of juror identifying information, including the ability to ferret out bias in individual jurors, should not depend on the vagaries of the media's attention, but on whether the defendant or his associates have or are likely to engage in conduct that justifies compromising the defendant's rights.

If anonymous juries are to be permitted, the lower courts need guidance on when the remedy may be employed and on whether it is authorized in only rare instances when the need to withhold juror identifying information from the defense is proven. The lower courts do not agree on that question and this conflict should be resolved by this Court.

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[17] That is the remedy employed in cases that generated far greater media attention than the Edwards trial – for example, the Timothy McVeigh trial, No. 96 Cr. 00068 (D. Colo. T4/26/97/pp.5133, 5160) and the Unabomber trial. The Unabomb Trial Media Coalition, 183 F.3d 949 (9th Cir. 1999).

III. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT IN THE CIRCUITS OVER WHETHER A COURT MAY CONSIDER MATERIALS NOT PRESENTED TO THE JUDICIAL OFFICER IN A WIRETAP OR WARRANT APPLICATION IN DECIDING WHETHER A FRANKS HEARING IS REQUIRED

This Petition will also raise a question concerning what a court may consider in evaluating whether a hearing, pursuant to Franks v. Delaware, 438 U.S. 154 (1978), is required when an affidavit in support of a search warrant or wiretap application is determined to be false and misleading. In this case, extensive wiretaps were authorized on the basis of an affidavit that misrepresented the reliability of the government's "confidential informant." The Fifth Circuit, without any analysis, adopted the decision in United States v. Brown, 298 F.3d 392 (5th Cir. 2002) (App. 16), which involved the same wiretap applications. In fact, there were three separate opinions in the Brown case. Two Judges held that the wiretap application was misleading. (App. 335, 339) The entire Panel nonetheless agreed that there was probable cause to support the wiretaps based on the Court's review of transcripts of consensual tape recordings made by the informant – transcripts that were summarized by the government in materially inaccurate ways in both Brown and this case, but which were not furnished to the judge who issued the original wiretap authorization.

There is great uncertainty among the Circuits over what the defendant must show in order to establish a right to a Franks hearing. Franks itself held that a warrant can be upheld without a hearing only if, when the misleading material is excised, "there remains sufficient content in the warrant affidavit to support a finding of probable cause." 438 U.S. at 172 (emphasis added). Other Circuits, too, have explicitly held that the only materials that may be considered in evaluating probable cause and the need for a hearing are the materials actually presented to the issuing

magistrate or judge. See, e.g., United States v. Weaver, 99 F.3d 1372, 1378 n.3 (6th Cir. 1996) (noting that the government cannot bolster affidavit with material submitted at suppression hearing); United States v. Vigeant, 176 F.3d 565, 569 (1st Cir. 1999) (probable cause must be determined from "four corners of the affidavit"); Rice v. Wolff, 513 F.2d 1280 (8th Cir. 1975), rev'd on other grounds, 428 U.S. 465 (1976) (probable cause must be shown to magistrate and cannot be gained from other information).

The decision in this case is in conflict with Franks and with the decisions of other Circuits. It dispenses with the need for a Franks hearing if the reviewing court, exercising de novo review, determines from a retroactive evaluation of the evidence in the record that probable cause would have existed to justify the warrant, even if the evidence being considered by the reviewing court was not presented to the judicial officer issuing the warrant. In other words, in the Fifth Circuit, the standard for determining whether an evidentiary hearing is required is not whether the excised affidavit would, by itself, support a finding of probable cause, but whether the reviewing court, in light of all the information made available to it, retroactively finds probable cause to support the warrant.

Resolving the conflict is exceptionally important. Wiretaps are extraordinarily intrusive and are of broad geographic scope. There is a compelling need for a uniform standard of review. Consequently, certiorari should be granted on this issue.

CONCLUSION

This Petition raises three important constitutional issues about which the law is in conflict. Had the defendants prevailed on any of these issues, the government likely would have sought certiorari because of their significance. The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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November 18, 2002

Supreme Court, U.S.
FILED

No. 02 927 DEC 16 2002

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

EDWIN EDWARDS and
STEPHEN EDWARDS,
Petitioners,

--against--

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

APPENDIX TO THE PETITION

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TABLE OF CONTENTS

1. Decision of the Court of Appeals for the Fifth Circuit dated August 23, 2002 (303 F.3d 606) ..... App. 1

2. Order Denying Petitions for Rehearing and Rehearing En Banc dated September 23, 2002 ..... App. 74

3. Decision of the Middle District of Louisiana dated January 5, 2001 ..... App. 76

4. Decision of the Middle District of Louisiana dated July 27, 2000 (119 F.Supp.2d 589) ..... App. 137

5. Decision of the Middle District of Louisiana dated August 22, 2000 (124 F.Supp.2d 387) ..... App. 211

6. Decision of the Court of Appeals for the Fifth Circuit in United States v. Brown dated July 15, 2002 (298 F.3d 392) ..... App. 300

REVISED OCTOBER 17, 2002

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-30036

UNITED STATES OF AMERICA,
Plaintiff-Appellee
v.
EDWIN EDWARDS; STEPHEN EDWARDS;
CECIL BROWN; ANDREW MARTIN;
BOBBY JOHNSON,
Defendants-Appellants.

Appeals from the United States District Court
for the Middle District of Louisiana, Baton Rouge

August 23, 2002

Before HIGGINBOTHAM, WIENER and BENAVIDES, Circuit Judges.

Benavides, Circuit Judge:

After a long, complex trial, the former governor of Louisiana, his son, and several of his associates were convicted for their roles in various schemes to make money from Louisiana's riverboat gambling license process by exploiting the former governor's apparent ability to influence that process. The defendants appeal their convictions for, inter alia, extortion, mail and wire fraud, money laundering, making false statements, and RICO violations. Finding no reversible error, we affirm.

I.

Edwin Edwards was a prominent figure in Louisiana politics for more than two decades. After serving in the Navy during World War II and later obtaining his law degree, he spent several years in private practice and local politics. He served as a member of the United States House of Representatives from 1965 until 1972, when he was elected to the first of two consecutive terms as Governor. In 1980, he left the governor's office and served briefly on the Louisiana Supreme Court. He then returned to private practice until 1984, when he was elected to a third term as Governor. After two federal corruption trials in 1985 and 1986, resulting in a hung jury and an acquittal, respectively, he lost his bid for re-election in 1987. In 1992, however, the voters sent him back to the Governor's office for an unprecedented fourth term. When that term ended in 1996, he once again returned to private practice. In private practice, he worked closely with his son, Stephen Edwards, who is also a lawyer.

Stephen and Edwin Edwards were convicted with several of the Governor's associates. Cecil Brown ("Brown"), an auctioneer and businessman, held the title of "Special Assistant to the Governor." Andrew Martin ("Martin") was a businessman who worked in the commercial fishing and marine towing industries, along with serving as a public official on state commissions. From 1992 to 1995, Martin held the title of Executive Assistant to the Governor. Bobby Johnson ("Johnson"), a self-made cement magnate, was a close friend of Edwin Edwards. In addition to these convicted defendants, two of Edwin Edwards' associates were acquitted: Gregory Tarver ("Tarver"), a Louisiana State Senator and Ecotry Fuller ("Fuller"), a former member of the Louisiana Gaming Control Board ("the Board").

Originally, these seven men were indicted en masse. The government alleged that each was a member of a conspiracy to

violate the Racketeer Influenced and Corrupt Organizations Act ("RICO"). The indictment broke the conspiracy into five separate schemes. Pursuant to each scheme, the conspirators were alleged to have extorted money from various individuals who sought approval of riverboat casino projects. The conspirators promised to help these individuals obtain licenses in exchange for money and threatened to make obtaining the licenses impossible if they did not pay.[1] It was further alleged that the conspirators attempted to launder the money obtained through the schemes.

Brown was the major player in the LRGC/NORC Scheme. Brown, ostensibly representing Edwin Edwards (who was acquitted of all acts relating to this scheme), defrauded and extorted the Louisiana Riverboat Gaming Corporation ("LRGC") and the New Orleans Riverboat Corporation ("NORC") (controlled by the same principals) by promising each a riverboat license if they paid exorbitant consulting fees despite the fact that he knew that LRGC and NORC would not receive licenses. Brown spoke with LRGC/NORC principals between the Fall of

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[1] In 1992 the Louisiana Riverboat Gaming Commission was created to evaluate applicants for fifteen riverboat gaming licenses available in Louisiana. The Commission was made up of seven panel members, each of whom was appointed by Edwin Edwards. By 1993, it had awarded all fifteen certificates of preliminary approval. The Commission did not have authority to issue the licenses, as it only determined whether the applicant was acceptable. Nevertheless, fourteen of the fifteen applicants awarded preliminary approval were granted licenses by the Louisiana State Police, Riverboat Gaming Division. In 1996, the Commission was replaced by the Louisiana Gaming Control Board, made up of six members appointed by Governor Mike Foster. The Board awarded the final certificate of preliminary approval. The appellants' extortion demands were based on their actual or apparent ability to manipulate
the votes of these two entities.

1991 and the Summer of 1993, when the key licensing vote occurred. During that period, Brown was paid approximately $350,000.

Brown and Johnson carried out the Jazz Scheme. Claiming to represent Edwin Edwards, they extorted Jazz Enterprises, Inc. ("Jazz"), one of three applicants for two available Baton Rouge riverboat licenses. Brown and Johnson spoke with the Jazz principals between February 1994 and August 1994. Jazz did not agree to the extortion demand, but it received a license anyway in July 1994. Edwin Edwards was ultimately acquitted on all counts relating to this scheme.

Stephen Edwards, his friend Richard Shetler ("Shetler") and Edwin Edwards were the major players in the Players Scheme. Stephen Edwards, representing his father, extorted Players Casino ("Players"), demanding that it retain him as a lawyer and hire his merchandising firm and Shetler as consultants to obtain a license and receive other benefits. Stephen Edwards spoke with Players between May 1993 and approximately February 1995. During this time, Players paid Shetler and Stephen Edwards more than a million dollars.

The primary participants in the Treasure Chest Scheme included Martin, Edwin Edwards, and Stephen Edwards. Martin, representing the Governor, extorted Robert Guidry ("Guidry"), who was a principal of the Treasure Chest Casino. Martin was in contact with Guidry between April 1994 and April 1997. Over these years, Guidry paid Stephen Edwards, Edwin Edwards, and Martin more than a million dollars.

The 15th Riverboat License Scheme, so named because it was the final license to be awarded by the Board, was a father-son operation. Stephen Edwards and Edwin Edwards extorted Eddie DeBartolo, Jr. ("DeBartolo") and his business partner, Ed Muransky. DeBartolo, the then-owner of the San Francisco 49ers professional football team, was seeking a

riverboat license pursuant to a joint venture between his company, DeBartolo Entertainment Corporation, and Hollywood Casino. Edwin Edwards and Stephen Edwards were in contact with DeBartolo between September 1996 and April 1997. DeBartolo made a one-time $400,000 payment to Edwin Edwards and Stephen Edwards in March 1997.

On August 4, 1999, a grand jury returned a 34-count superseding indictment, charging appellants Edwin Edwards, Stephen Edwards, Martin, Johnson and Brown with a violation of RICO [18 U.S.C. § 1961 et seq.], conspiracy to violate RICO [18 U.S.C. § 1962(d)], mail and wire fraud [18 U.S.C. § 1341 et seq.], extortion [18 U.S.C. ° 1951], money laundering [18 U.S.C. § 1956], interstate travel and communication in aid of racketeering [18 U.S.C. § 1952] and false statements [18 U.S.C. § 1001].

The case was tried to a jury, and the appellants were convicted as follows: Edwin Edwards [Counts 1-2 (RICO), 12-15 (Players extortion), 17-19 (Treasure Chest extortion), 20-22 (15th Riverboat License fraud), 25-27 (15th Riverboat License fraud), 31 (15th Riverboat License extortion) and 34 (money laundering)]; Stephen Edwards [1-2, 12-15, 16 (Interstate Travel in Aid of Racketeering) 17-19, 20-22, 25-27, 31 and 34]; Martin [1-2, 17-19 and 34] Brown [1-2 and 3-4 (Jazz extortion)]; and Johnson [3-4, 5 (Interstate Communication in Aid of Racketeering), 6 (fraud), and 7-11 (false statements)]. Subsequent to the verdict, the Supreme Court decided Cleveland v. United States, 531 U.S. 12 (2000), holding that mail and wire fraud convictions cannot be based on the theory that the government was defrauded of its intangible right to issue licenses (hereinafter, "license as property theory"). In light of Cleveland, the district court granted new trials as follows: Edwin Edwards [Counts 20-22 and 25-27]; Stephen Edwards [20-22 and 25-27]; and Johnson [6].

In the process of trying this case, the district court made a number of rulings that are now challenged. Specifically, the appellants contend that: (1) the district court erred by empaneling an anonymous jury; (2) the district court erred when it admitted evidence obtained via unauthorized wiretaps; (3) the district court erred when it admitted hearsay evidence pursuant to Fed. R. Evid. 801(d)(2)(E); (4) the district court erred when it ordered Johnson tried in absentia; (5) the district court erred when it dismissed Juror #68 during deliberations; (6) the evidence at trial was insufficient to support all Brown and Johnson's convictions as well as Stephen Edwards's extortion conviction relating to the 15th Riverboat License Scheme; (7) the spillover effect from the counts based on the Cleveland-repudiated "license as property" theory requires reversal of appellants' convictions on some or all of the other counts; (8) Stephen Edwards' sentence should be vacated because the calculation of the extortion payments was overstated; and (9) Johnson's sentence should be vacated because the calculation of the extortion payments was overstated and because the evidence did not support an adjustment for obstruction of justice; (10) the restitution award against Martin should be set aside because it was not supported by the jury verdict; and (11) various aspects of their trial violated their due process rights. We address each contention in turn.

II.

Aware of the intense media, political, and emotional atmosphere surrounding this case, the district court withheld certain identifying information about potential jury members. This omitted information included their names and places of employment. Regarding the potential jurors' residential information, the district court released their zip codes and parishes, but withheld the exact addresses. Despite the lack of access to this information, the parties were able to view a large amount of other information about the venirepersons, including a twenty-eight page questionnaire consisting of 116 questions, some with subparts. Moreover, they were allowed to propose

questions for potential jury members and ask follow-up questions. The defendants contend that by withholding some juror information, the district court violated their right to a fair trial before an impartial jury. Additionally, they argue that this injury was exacerbated by the district court's decision to close the proceedings it held to determine whether to withhold juror information. The closure of these proceedings, the defendants contend, violated their Sixth Amendment right to a public trial.

A.

We have previously recognized the seriousness of the decision to withhold juror information, holding that it should be a last resort in a court's efforts to protect the jurors from intimidating or prejudicial influences. See United States v. Krout, 66 F.3d 1420, 1427 (5th Cir. 1995). This interest in juror protection must be balanced against the defendant's interest in effective voir dire and the presumption of innocence. See id. The decision to empanel an anonymous jury is within the discretion of the district court. United States v. Sanchez, 74 F.3d 562, 564 (5th Cir. 1996). Factors that may support a district court's decision include:

(1) the defendants' involvement in organized crime;

(2) the defendants' participation in a group with the capacity to harm jurors;

(3) the defendants' past attempts to interfere with the judicial process or witnesses;

(4) the potential that, if convicted, the defendants will suffer a lengthy incarceration and substantial monetary penalties; and

(5) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation and harassment.

Krout, 66 F.3d at 1427. Although the district court must base its decision on "more than mere allegations or inferences of potential risk[,]" id., it may consider the indictment and affidavits submitted by the parties. See United States v. Wilson, 160 F.3d 732, 747 (D.C. Cir. 1998) (relying on indictment and prosecutor's affidavit); Krout, 66 F.3d at 1427 (relying on unsworn affidavit). In view of the totality of the circumstances, the district court must "make a sensitive appraisal of the climate surrounding a trial and a prediction as to the potential security or publicity problems that may arise during the proceeding." United States v. Branch, 91 F.3d 699, 723-24 (5th Cir. 1996) (quoting United States v. Childress, 58 F.3d 593, 702 (D.C. Cir. 1995)). We will not find an abuse of discretion if the "evidence at trial supports the conclusion that anonymity was warranted." Krout, 66 F.3d at 1427.

As the Krout factors suggest, the paradigmatic situation justifying an anonymous jury is an organized crime trial, where the safety of the jurors becomes an overriding concern. See, e.g.,United States v. Salvatore, 110 F.3d 1131, 1143-44 (5th Cir. 1997) (upholding anonymous jury in case involving organized crime defendants), overruled on other grounds by Cleveland, 531 U.S. 12 (2000); Krout, 66 F.3d at 1427 (upholding anonymous jury in prosecution of member of Texas "Mexican Mafia"). This is not to say, however, that the withholding of juror information is appropriate only in organized crime cases. We have previously approved of an anonymous jury when the case attracts unusually large media attention and arouses deep passions in the community. In the Branch case, we affirmed the district court's decision to withhold certain identifying juror information in the trial of former members of the Branch Davidian sect. Cautioning that "[n]ot all celebrated trials merit an anonymous jury," we

nevertheless relied on the intense press coverage and the passions that the trial incited, even though there was no indication that any of the defendants would interfere with the jurors. Branch, 91 F.3d at 723-24. In this respect, the present case closely resembles Branch. The overriding concern, and the most important factor in the district court's analysis, was the intense media interest and highly charged emotional and political fervor that surrounded the trial. Edwin Edwards was a four-term governor who, partly because of his previous legal entanglements, was a polarizing figure in Louisiana politics. His son, Stephen Edwards, had attracted intense media coverage. Tarver was a Louisiana state senator. In addition to these high profile defendants, several well known witnesses would testify at trial, including DeBartolo, the owner of the Super Bowl Champion San Francisco 49ers, and Cleo Fields, a state senator and former United States Congressman.

Moreover, the district court did not base its decision on publicity alone. There were several allegations and examples of attempts to interfere with the judicial process and witnesses. The indictment charged Edwin Edwards and Stephen Edwards with the illegal wiretapping and countersurveillance of an FBI agent.[2] In a related trial, Edwin Edwards was accused of witness tampering,[3] and the government filed an affidavit accusing Edwin Edwards of using a state trooper to run records searches on certain persons during his previous criminal trials. Furthermore, the present case involved his efforts to corrupt the state's process for licensing riverboat gambling.

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[2] A co-defendant, Dempsey White, pled guilty to a related charge, but the wiretap charge against Edwin Edwards and Stephen Edwards was later severed from the rest of the case.

[3] Edwin Edwards was ultimately acquitted of this charge on October 11, 2000.

In addition to these indications of the defendants' disregard for proper administrative and judicial processes, the remaining Krout factors also support the district court's decision to withhold juror information. The defendants all faced long periods of incarceration and significant prison sentences if convicted on all charges. Edwin Edwards alone faced a maximum of 375 years in prison and a fine of over $7,500,000. Furthermore, the district court was concerned with the possibility that persons not directly involved with the case would engage in juror intimidation or harassment. Intrepid members of the media, for example, published the identity of a juror when it was discovered. They also attempted to identify jurors by determining where they were parked and obtaining their license plate information. Moreover, Edwin Edwards had numerous close political operatives and allies who also might have attempted to influence the jurors. The prospect of such interference from the media and politically interested third parties militates in favor of withholding juror information.

In assessing the reasonableness of the balance that the district court struck between the defendants' rights and the protection of the jurors, we also note that the information withheld from the parties was limited. In referring to such juries as "anonymous," we have previously cautioned against "painting with too broad a brush." Branch, 91 F.3d at 723. As in Branch, the jury here was "anonymous" only "in the most literal sense." Id. The parties had access to the jurors' zip codes, parishes, and the extensive information contained in the long questionnaire. With this information, the defendants are hard-pressed in demonstrating that they were prejudiced in any way during voir dire. They point to Juror 370, who had indicated on a questionnaire that she knew Stephen Edwards' wife's mother and grandmother "all her life." A post-trial investigation allegedly revealed that she had made negative statements about Edwin Edwards in the past. While recognizing that the withholding of juror information naturally invites this type of problem, we cannot find any real prejudice related to the empaneling of Juror

370. Her connection to Stephen Edwards was tenuous, and there is no indication that this connection biased her against the defendants.

Finally, we do not overlook the fact that the district court minimized the possibility of any prejudice to the defendants by giving an explanatory jury instruction, which was similar to the instruction upheld in Branch. See id. at 724 (noting that the trial judge in that case had explained the anonymity procedures as a response to intense trial publicity, polled the jury for any bias, and reaffirmed that the defendants were entitled to a presumption of innocence). This instruction referred to the intense media publicity as the reason for anonymity and gave no indication that the jurors should fear for their safety from the defendants. It reiterated that the defendants were presumed innocent until proven guilty and that the district court was using these procedures to protect juror privacy and ensure a fair trial for both sides. The district court then questioned the jurors to determine whether they had any bias toward either party as a result of the decision to withhold their names. All jurors assured the district court that they did not harbor any such bias. Accordingly, in light of the weighty reasons for concealing juror information, the limited scope of the concealment, and the district court's careful efforts to avoid prejudicing the defendants, we find no abuse of discretion.[4]

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[4] Martin argues that even if the district court was justified in withholding information from some defendants, those justifications do not apply to him. This argument suffers from several flaws. First, the district court explicitly stated that there was direct evidence to justify an anonymous jury in the cases of Edwin Edwards, Stephen Edwards, and Martin. See United States v. Edwards, 119 F.Supp.2d 589, 603 n.76 (M.D. La. 2000). Regarding Martin, the district court pointed to a phone conversation in which Martin claimed that he had a transcript of a wiretap and that he had received it from a "friend of a friend of

B.

The defendants also contend that the district court's decision to close the hearing on whether to empanel an anonymous jury violated their Sixth Amendment right to a public trial. Their opposition to the closure represented a reversal of strategy. Initially, they had argued that the proceedings should not be public. Once damaging information appeared in the media, however, they began to worry about public speculation that Edwin Edwards had ties to organized crime. As a result of this concern, they changed their minds and unsuccessfully attempted to open the proceedings.

At the outset, we note that we have already approved the closure of voir dire proceedings in a related case, in which Edwin Edwards was also a defendant. See United States v. Brown, 250 F.3d 907, 922 (5th Cir. 2001). Although Brown involved a First Amendment challenge to the closure of the voir dire proceedings, this distinction does not change our analysis. The caselaw applying the Sixth Amendment guarantee of a public trial was originally developed in cases involving the right of the public and press to attend trials, which is implicit in the First Amendment. See Ayala v. Speckard, 131 F.3d 62, 68-69 (2d Cir. 1997) (en banc); see also Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) (discussing press access to voir dire); Globe

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a friend," chuckling afterward. Although Martin claims that this transcript was publicly available, his comments during the conversation suggest something short of reverence for the judicial process. Second, even if there were no evidence of jury tampering or disregard for the judicial process, Branch clearly stands for the proposition that if other factors such as media interest are strong enough, an anonymous jury can be appropriate. See Branch, 91 F.3d at 724. We therefore conclude that the district court did not abuse its discretion by withholding juror information from Martin.

Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (discussing press access to trial and preliminary hearing); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (discussing press access to trial). In Waller v. Georgia, 467 U.S. 39 (1984), the Supreme Court applied these standards in the Sixth Amendment context, holding that the closure of a suppression hearing may violate the defendant's right to a public trial. Id. at 47 ("In sum, we hold that under the Sixth Amendment, any closure of a suppression hearing over the objections of the accused must meet the tests set out in Press-Enterprise and its predecessors."). In doing so, the Court articulated the following test for determining whether the closure of a proceeding violates the Sixth Amendment:

> (1) the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced;
> (2) the closure must be no broader than necessary to protect that interest;
> (3) the trial court must consider reasonable alternatives to closing the proceeding; and
> (4) it must make findings adequate to support the closure.

Id. at 48. Subsequent to Waller, the Court refined the first factor of this test, requiring a "substantial interest." Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 14 (1986).

We must first determine whether Waller applies to the proceedings at issue in this case. In United States v. Norris, 780 F.2d 1207, 1210-11 (5th Cir. 1986), we refused to extend that test to a bench conference about the admissibility of a particular piece of evidence. We distinguished full suppression hearings, like the one considered in Waller, on the grounds that they often resemble a mini-trial and commonly determine the outcome of the prosecution. Id. at 1210. Because suppression hearings

feature witnesses and involve an attack on the police and prosecutors, there is a vital public role in discouraging perjury and assuring that the government comports itself responsibly. Id. By contrast, legal arguments over relatively routine administrative matters do not implicate such concerns. Id. Although it is impossible to characterize the proceedings regarding the district court's decision on whether to withhold juror information as outcome determinative, we do see an important public role that counsels in favor of applying the Waller test. Like the suppression hearing, such proceedings involve an attack on the prosecution, specifically its accusations that the defendants constitute a threat to the integrity of the jury. Therefore, the argument that the presence of the public discourages perjury and encourages prosecutorial responsibility applies with some force to the anonymous jury proceedings. Accordingly, we decline to hold that the closure of such proceedings can never violate the Sixth Amendment.

This is not to say, however, that the proceedings always must be conducted in public. Rather, the Waller test recognizes that a limited closure of proceedings can serve a substantial institutional interest without violating the Sixth Amendment. Indeed, the interest in avoiding prejudice in the jury pool may be particularly compelling in situations like these. Because these proceedings are not full trials, there is often a limited chance for the defendant to properly contextualize or fully attack what are often mere allegations. As in the present case, the district court often will be relying in part on affidavit, accusation, and suggestion. In the absence of a full, critical evaluation and cross-examination, such raw allegations could make their way into the public discourse, thereby proving highly prejudicial to the defendant.

The defendants argue that the district court was not motivated by this interest in a fair trial for them, but rather closed the proceedings to protect the government. The record does not support this contention. The district court did worry about the

association of "inaccurate motives with the government's motion," but its concern was clearly with the fairness of the impending trial and, in particular, the prejudicial effect of such public speculation on the defendants. Moreover, in case any doubt surrounded the district court's motives, it summed up its core concern: "The overall effect of conducting a public hearing on the motion would be just the harm the Fifth Circuit warns against: an unfair trial for the defendants." We therefore conclude that a substantial interest supported the district court's decision to hold nonpublic proceedings on the motion for an anonymous jury.

We also conclude that the district court's action was no broader than necessary, as the defendants have proposed no viable alternatives to closure. They propose that the district court should not have worried about the possible taint of the jury pool because any tainted potential jurors could have be removed during voir dire. Acknowledging the potential prejudicial effect of accusations about the defendants' alleged threat to juror integrity, however, we decline to require district courts to wait until voir dire to remedy any taint. Rather, we preserve the district court's ability, when necessary, to act prophylactically to avoid the problem. Accordingly, we hold that the closure of the proceedings surrounding the anonymous jury did not violate the Sixth Amendment guarantee of a public trial.

III.

At trial, the government relied in part on evidence obtained from the electronic surveillance of Cecil Brown's phones and Stephen Edwards' office. This surveillance began after the government was approached by an informant, Pat Graham ("Graham"). Based on information provided by Graham, the government filed an application to wiretap Brown's home and office phones. The information it learned from this surveillance led to the wiretap of Edwin Edwards' home. Eventually, the government also placed bugs, video cameras, and

wiretaps in the offices of Edwin Edwards and Stephen Edwards. The defendants now challenge this surveillance. Their primary argument is that the original authorization for the Brown wiretap was improper because the FBI affidavit in support of the application was based on misleading information. This argument has already been considered and rejected by another panel of this Court in United States v. Cecil Brown, 2002 WL 1495898 (5th Cir. July 15, 2002). Upon our own review, we also find no merit in the defendants' arguments on this issue. In addition, Brown contends that the district court erroneously admitted intercepted communications between him and his civil attorneys in violation of the attorney-client privilege. Finally, Stephen Edwards argues that the government was not authorized to monitor his conversations with listening devices placed in his office.

A.

Brown contends that the district court erred in admitting wiretap intercepted conversations in violation of the attorney-client privilege. The conversations in question included several discussions, which at times involved Brown, his attorneys, Kenneth Pitre ("Pitre") and Robert J. Lenze ("Lenze"), and Edwin Edwards. They relate to lawsuits brought by principals of LRGC/NORC for the return of money extorted by Brown. In an October 21, 1996 conversation, Brown, Edwin Edwards, and Pitre discussed the possible characterization of the extortion money paid to Brown as a loan rather than income because "we are not ever going to admit that this is a payment to him because then we'd owe income taxes on it." They then discussed the failure of LRGC/NORC to obtain a license, with Edwin Edwards stating that "Cecil can take the position that he did what was asked," and Brown responding "I carried the water to the right places."[5] Edwin Edwards then opined that they

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[5] Brown also argues that the district court abused its discretion when it allowed a career FBI agent to testify that, in

needed someone to testify that LRGC/NORC was not awarded a license because "they were not strong enough financially." This explanation covered up the true reason for LRGC/NORC's lack of success, as articulated by Brown: "the Governor has too many friends." In a separate conversation, Brown told his attorney that the handling of the LRGC/NORC payments could not be exposed "openly in court" because with that money he had to "take care" of a "guy on the [Gaming] Board; and because we were throwing money around like crazy."

The attorney-client privilege, the oldest and most venerated of the common law privileges of confidential communications, serves important interests in our judicial system. See Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). Nevertheless, despite its venerated position, the privilege is not absolute and is subject to several exceptions. Under the crime-fraud exception to the attorney-client privilege, the privilege can be overcome "where communication or work product is intended 'to further continuing or future criminal or fraudulent activity.'" In re Grand Jury Subpoena, 220 F.3d 406, 410 (5th Cir. 2000) (quoting United States v. Dyer, 722 F.2d 174, 177 (5th Cir. 1983)). The government, as the proponent of the otherwise privileged evidence, "has the burden of establishing a prima facie case that the attorney-client relationship was intended to further criminal or fraudulent

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light of his experience, he believed that "carry the water" referred to the paying off of public officials. He contends that this was an expert opinion, but was never noticed or qualified for such purposes. This argument is without merit. We have previously found it acceptable for a lay witness to "draw straightforward conclusions from observations informed by his own experience." United States v. Riddle, 103 F.3d 423, 429 (5th Cir. 1997). As the FBI agent's testimony merely represented his own informed opinion, the district court did not abuse its discretion in allowing it.

activity." Id. at 410. The district court agreed that the crime-fraud exception applied to these attorney-client communications, as Brown was using his lawyer's services to cover up crimes related to his extortion of LRGC/NORC. Because the application of the attorney-client privilege is a fact question to be determined in light of the purpose of the privilege and guided by judicial precedents, we review the district court's finding for clear error only. United States v. Aucoin, 964 F.2d 1492, 1498 (5th Cir. 1992).

In determining whether the crime-fraud exception applies, we focus on the client's purpose in seeking legal advice. In re Grand Jury Proceedings, 43 F.3d 966, 972 (5th Cir. 1994) (per curiam). Brown relies heavily on the fact that the lawsuits that he hired Pitre and Lenze to defend did not allege any fraud or other crimes. He further contends that the communications are privileged because they relate only to a defense against allegations of past wrongs, not continuing or future crimes. The district court agreed with the findings of Judge John V. Parker of the Middle District of Louisiana, who determined that (1) the payments at issue in the lawsuits were made to Brown in exchange for his guarantee of obtaining riverboat licenses for LRGC/NORC through means of bribery and fraud and (2) Brown subsequently sought legal services to conceal and cover up the crimes committed with respect to the payments. We cannot conclude that these findings were clearly erroneous. Rather than merely defending himself against civil actions alleging past wrongdoing, Brown was actively continuing the cover-up of his extortion and perpetuating his tax fraud. Cf. Dyer, 722 F.2d at 177-78 (holding that a defendant's use of a civil attorney to obtain a false exculpatory letter was not privileged under the crime-fraud exception). Accordingly, we find no abuse of discretion in the admission of the communications between Brown and his attorney.

B.

The information it learned from consensual recordings and covert surveillance of Brown and others led the government to seek permission to increase its monitoring of Edwin Edwards and his associates. On December 6, 1996, the government obtained an authorization order to intercept oral communications "at the premises known as the law office of Edward [sic] W. Edwards located at 4621 Jamestown Avenue." The named interceptees included Edwin Edwards, Brown, Richard L. Stalder, Pitre, Marion D. Edwards, and Wanda Edwards. Pursuant to this authorization order, the government placed listening devices in the personal office of Stephen Edwards and intercepted at least two of his conversations. The defendants contend that these actions exceeded the scope of the December 6 order in two ways. First, the government was not allowed to place monitoring devices in the office of Stephen Edwards. Second, even assuming arguendo that the order permitted the placement of devices in Stephen Edwards' office, it did not provide for the interception of his conversations because he was not a named interceptee. The district court rejected these arguments. We review its interpretation of the December 6 order de novo. See United States v. Smith, 273 F.3d 629, 632 (5th Cir. 2001) (legal conclusions on motion to suppress reviewed de novo); United States v. Reyna, 218 F.3d 1108, 1110 (9th Cir. 2000) (wiretap suppression reviewed de novo).

Certainly, the defendants are correct in noting that the December 6 order does not explicitly refer to Stephen Edwards' personal office. This omission, however, does not end the inquiry, as we must still determine whether the placement of devices in Stephen Edwards' office was justified under the order's reference to 'the premises known as the law office" of Edwin Edwards. Central to the resolution of this issue is the definition of "the premises known as the law office," specifically, whether it referred to the entire group of legal offices at 4621 Jamestown Avenue or merely to Edwin Edwards'

personal office within the suite. Because it is not clear from the face of the order how expansive that term was intended to be, it is helpful to consult the affidavit and application upon which the order was based.[6] A reading of the detailed, sixty-seven page affidavit submitted by FBI Special Agent Geoffrey C. Santini supports an expansive interpretation of "the premises known as the law office." The affidavit states, in part:

> On December 3, 1996, a separate cooperating witness (CW-3) advised that if an individual entered the front door of the law office and turned right at the reception desk, the first office on the right as one proceeded down the hall is the personal office of Stephen R. Edwards. The next office on the right down the hall is the personal office of Edwin W. Edwards. (Affiant asserts that Edwin W. Edwards' office is located in the front corner of the law office). CW-3 advised that Edwin W. Edwards currently conducts business in his personal office and on occasion in the office of Stephen R. Edwards.

As this passage suggests, there is a difference in usage between the terms "law office" and "personal office." This distinction is

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[6] The defendants object to our consideration of the affidavit, noting that the affidavit was not physically connected to the order or even referenced in it. See United States v. Dahlman, 13 F.3d 1391, 1395 (10th Cir. 1993) (refusing to expand scope of warrant based on affidavit where the affidavit was not physically attached to the warrant or referenced in it). There is a difference, however, in resorting to the affidavit to resolve an ambiguity and relying on it to expand an otherwise clear term in the order. Because our inquiry is limited to the former, we reject the defendants' argument that the affidavit is irrelevant.

further supported by an attachment to the affidavit, which diagrams the layout of the entire office. The attachment indicates that although Edwin Edwards and Stephen Edwards had separate personal offices, the entire group of offices comprised a single, cohesive office area. There was a common reception desk, library, conference room, clerical/secretary area, and coffee area. Finally, the affidavit stated that, according to a cooperating witness, Edwin Edwards "would in effect use the entire office for meetings and on many occasions the CW would meet and observe [Edwin] Edwards in Stephen R. Edwards [sic] office." Our review of the affidavit, therefore, clarifies that the December 6 order's reference to the law office of Edwin Edwards includes the entire group of legal offices at 4621 Jamestown Avenue, not merely the personal office of Edwin Edwards.[7] Accordingly, we agree with the district court that the order permitted the government to place listening devices in the personal office of Stephen Edwards.

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[7] In interpreting the terms of the December 6 order, we ultimately place little weight on the government's decision on April 16, 1997 to include a specific reference to the "law office" of Stephen Edwards in its application for an extension and modification of the authorization order. The defendants argue that the explicit reference to Stephen Edwards' law office in the April 1997 application is a tacit admission that the government did not previously have the authority to monitor his office. We think the reliance on the April 1997 application is misplaced. The issue in determining the proper scope of the December 6 order's reference to the law office of Edwin Edwards is what the issuing court intended by the use of the term "law office." As such, we consulted the December 6 affidavit on which it relied. By contrast, the government's intent in changing the language of its April 1997 application is, at best, of marginal relevance to our analysis of the court's use of the term "the premises known as the law office" in the December 6 order.

The defendants further contend that even if the listening devices were properly placed in Stephen Edwards' office, the government was not permitted to listen to his conversations because he was not a named interceptee. In particular, two conversations are at issue. The first conversation, which took place on December 19, 1996, involved Edwin Edwards and Stephen Edwards discussing how to write checks so that they could disguise the criminal proceeds. The next day, the government intercepted a second conversation featuring Stephen Edwards talking with Wanda Edwards, Marion Edwards, and Cecil Brown, all three of whom were named interceptees. Again, it is beyond dispute that Stephen Edwards is not among the named interceptees in the December 6 order, and that he was not added to that list until January 15, 1997, when the first thirty-day extension was granted. The order, however, does not limit its scope to named interceptees only. Instead, it provides that interception may take place only when

> one of the named interceptees are [sic] within the target premises and are engaged in conversation or activity with any named or known coconspirator or any other individual that was caused to go to the target premises by a named interceptee or named or known coconspirator as related to the criminal offenses as set forth in paragraph A.

The government contends, and the district court agreed, that the interception of Stephen Edwards' conversations was appropriate because he was a coconspirator, as evidenced by the December 19 and 20 conversations. It further relied on the fact that the government kept the issuing court fully abreast of the monitoring through a December 27, 1996 status report. Therefore, it argues, the interception of these conversations was fully authorized.

We do not reach the same conclusion. As the government concedes, because Stephen Edwards was not a named

interceptee, the interception could be legal only if he was a "named or known coconspirator." Contrary to the government's suggestion, however, our focus in determining whether Stephen Edwards was a coconspirator must be on December 6, not on the dates of the intercepted conversations. Relying on the content of the actual conversations to justify post hoc otherwise illegal interception would constitute impermissible bootstrapping. If the interception was not legal when the conversation began, it does not become legal simply because of what the participants discussed. We must therefore look instead for evidence that the government knew that Stephen Edwards was a coconspirator on December 6. Not only does the government fail to identify any such evidence, the clear terms of its December 6 application and affidavit suggest that none exists. As of December 6, the government was aware that Stephen Edwards maintained an office at the target premises and that Edwin Edwards often used that office to conduct business. Nevertheless, there is no indication in the affidavit that the government thought that Stephen Edwards was involved in the alleged extortion schemes. By contrast, other members of the Edwards family who had offices at the target premises, such as Wanda Edwards and Marion Edwards, were suspected of illegalities and therefore were listed as named interceptees. In other words, our reading of the December 6 order, application, and affidavit leads us to the conclusion that Stephen Edwards was not listed as a named interceptee precisely because the government did not think he was a coconspirator. Accordingly, because we conclude that Stephen Edwards was not a "named or known coconspirator" under the terms of the December 6 order, we hold that the December 19 and 20 conversations were illegally recorded and should have been suppressed. See 18 U.S.C. § 2518(10)(a) (providing for suppression remedy).

Having determined that the district court's admission of the December 19 and 20 conversations involving Stephen Edwards was erroneous, we now must decide whether that error was harmless. To the extent that the error implicates Stephen

Edwards' Fourth Amendment rights, we ask whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Neder v. United States, 527 U.S. 1, 15 (1999) (quoting Chapman v. Cal., 386 U.S. 18, 24 (1967)). There is no dispute that the suppression of the December 19 and 20 conversations alone would not have made a difference in the verdict, as the evidence of the defendants' guilt was overwhelming. Rather, the defendants suggest that the evidence obtained from the December 19 and 20 conversations provided the basis for the inclusion of Stephen Edwards as one of the named interceptees on the January 15, 1997 wiretap application. Moreover, they contend 21that the conversations also led to the April 1997 search of Stephen Edwards' home. These arguments overstate the importance of the illegal interception. In its affidavit in support of its application for the January 15, 1997 wiretap authorization, the government detailed a January 9, 1997 conversation between Edwin Edwards and Martin. The two men discussed Stephen Edwards' role in the Treasure Chest Scheme, including a payment from Guidry to Stephen Edwards. Based on this evidence of Stephen Edwards' involvement in the extortion scheme, there was a solid basis for adding Stephen Edwards as a named interceptee on January 15, even without the December 19 and 20 conversations. After receiving the January 15 wiretap authorization, the government amassed extensive evidence of Stephen Edwards' criminal activities to support its subsequent April 1997 application for a search warrant. In light of this evidence, which was wholly independent of the December 19 and 20 conversations, we hold that the admission of the illegal interceptions was harmless beyond a reasonable doubt.[8]

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[8] The defendants also argue that they were entitled to a hearing pursuant to Franks v. Delaware, 438 U.S. 154 (1978). They do not, however, explain why such a hearing was necessary, except to assert in passing that there was no probable cause to support the placement of listening devices in the office

IV.

At trial the district court admitted, over hearsay objection, testimony from Bernie Klein ("Klein"), describing statements made to him by Sam Gilliam ("Gilliam"). It concluded that the statements were non-hearsay because they were statements by a co-conspirator in furtherance of a conspiracy. See Fed. R. Evid. 801(d)(2)(E). Klein backed the Gretna Belle riverboat casino project. At the time, Gilliam was a co-chairman of the Louisiana Riverboat Gaming Commission. Klein testified that he approached Gilliam after Gilliam voted against the Gretna Belle. Klein was surprised because he believed that Gilliam supported the Gretna Belle. Klein further testified that when he confronted Gilliam about the vote, Gilliam admitted that he had been instructed to change his vote or lose his livelihood.

The district court also admitted, over hearsay objection, testimony from Judge Hillary Crain ("Crain"), describing statements made by Ralph Perlman ("Perlman"), again

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of Stephen Edwards. This argument has no merit. The government had ample evidence from its cooperating witnesses that Edwin Edwards was using the entire law office, including Stephen Edwards' personal office, to carry out illegal activities. Moreover, because we do not interpret the December 6 order to authorize the interception of Stephen Edwards' conversations, we need not determine whether there would have been probable cause to do so. Therefore, we conclude that there was no deficit of probable cause in support of the December 6 order. To the extent that the defendants argue that they were entitled to a Franks hearing on another issue, such as the probable cause supporting the search of Stephen Edwards' or Edwin Edwards' homes, that argument has been waived for lack of sufficient development in the brief. See United States v. Posada-Rios, 158 F.3d 832, 867 (5th Cir. 1998) (deeming issued waived as a result of inadequate briefing).

concluding that the statements were non-hearsay because they were statements by a co-conspirator in furtherance of a conspiracy. See Fed. R. Evid. 801(d)(2)(E). At the time, Crain was the chairman of the Gaming Control Board and Perlman was a Board member. Crain was responsible for ensuring compliance with the Board's rules, specifically its no-contact policy, whereby Board members agreed not to meet with anyone ex parte to discuss the licensing votes. Crain testified that Perlman said that he met Edwin Edwards for lunch, at which Edwin Edwards expressed interest in the upcoming vote. Crain also testified to a second, later statement by Perlman that he met with Edwin Edwards an additional time. Perlman reported that at that meeting Edwin Edwards asked him for his vote and told him that he already had the votes of the other Board members.

The defendants argue that the two aforementioned sets of statements were admitted in violation of the Confrontation Clause because the government failed to offer evidence that Gilliam or Perlman were conspirators or that their statements furthered the conspiracy. See Bourjaily v. United States, 483 U.S. 171, 182-183 (1987) (explaining that because the co-conspirator statement exception to the hearsay rule is "firmly rooted," proper admission of a co-conspirator statement does not offend the Sixth Amendment).

Although it is not clear from the record that the appellants asserted the Confrontation Clause as to all of these statements (as opposed to a hearsay objection), we need not address whether they were admitted in violation because we conclude that their admission was harmless beyond a reasonable doubt. See Hafdahl v. Johnson, 251 F.3d 528, 539-40 (5th Cir. 2001). To determine whether the error was harmless, "we consider the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and of course, the overall strength of the prosecution's

case." Id. (citation omitted).

All that these two sets of statements tend to prove is that the conspirators were influencing, or attempting to influence, the licensing votes.[9] There was a great deal of evidence of this fact in the record, including a number of Fed. R. Evid. 801(d)(2) admissions by the defendants. Furthermore, the defendants extensively cross-examined both witnesses: in each case the cross-xamination took up much of an entire court day, Klein's cross-examination testimony taking up 140 pages of transcript and Crane's 167 pages. Finally and most importantly, having reviewed the record, we conclude that government presented a strong case of guilt, including the aforementioned admissions, each victim's testimony to the defendants' extortion efforts and overwhelming documentary and wiretap evidence.

V.

Nearly three months into the trial, the district court was faced with a major disruption when one of the defendants, Bobby Johnson, underwent multiple bypass surgery. Although the March 2000 operation was considered urgent, Johnson's heart condition was not a recent development. The problem first surfaced in relation to the trial when one of Johnson's attorneys, Patrick Fanning ("Fanning"), sent the district court a letter

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[9] The Gilliam statement goes a little farther, i.e., he indicates that someone threatened him. Though arguably prejudicial (much less so because the source of the threat was not identified), the threatening aspect of the persuasion is minimally harmful because it does not tend to prove any element of any charged offense. In fact, the defendants concede that "the evidence having to do with the corruption of the commission and the licensing process does not comprise one of the seven schemes that are the predicates for the substantive portions of RICO[.]"

informing it of Johnson's health problems. The September 10, 1999 letter explained that Johnson had learned the previous day that he had six blocked arteries, a condition that was not treatable by any method other than surgery. It further stated that during the next week, Johnson would be speaking to several surgeons to schedule the procedure as soon as possible. At a status conference on September 13-14, the district court expressed its concern about Johnson's health, and suggested that any surgery should be scheduled well in advance of the January 10, 2000 trial setting. It specifically admonished him not to wait until the last minute.

Indeed, only one day after the hearing, Johnson's cardiovascular surgeon, Carlton H. Sheely, M.D. ("Dr. Sheely"), sent Johnson a letter confirming that bypass surgery had been scheduled for September 24. Just two days prior to surgery, however, Johnson cancelled it and decided instead to undergo chelation therapy, an alternative treatment. A major factor in this decision was Johnson's fear that he would not survive the operation. His father-in-law had died after bypass surgery, and Johnson was afraid that he would suffer the same fate. Beyond assuaging his fears, though, chelation therapy had little to recommend it. Even Johnson admits that the evidence in support of it was mixed at best, and one of his doctors criticized it as "quackery."

Despite the district court's expressed concern about his condition, its worry that his health might jeopardize the trial schedule, and its desire to be kept up-to-date regarding the situation, Johnson never informed it that surgery had been scheduled and canceled. Moreover, instead of the careful medical attention that his condition required, Johnson went from September 1999 until March 2000 without seeing a cardiologist. During this time, he was treated by Stephanie F. Cave, M.D. ("Dr. Cave"), his physician and family friend, and James P. Carter, M.D., Chairman of the Nutrition Department at the Tulane School of Public Health and Tropical Medicine and a

proponent of chelation therapy. Over the course of his chelation treatment, Johnson did report feeling better. According to Dr. Sheely, however, this perceived improvement is consistent with the placebo effect. Therefore, by the start of trial on January 10, 2000, Johnson had cancelled the surgery that two separate cardiologists had recommended, had avoided his regular cardiologist, and had embarked on an unproven treatment regime. The only indication of this turn of events that he gave to the district court was a brief reference during a December 10, 1999 pretrial conference to the fact that he was currently undergoing chelation therapy.

Set against this course of conduct was Johnson's firm belief that it was in his best interest to go to trial with the rest of the defendants, particularly Edwin Edwards. Specifically, he was hoping that some of the former governor's reputed good will would rub off on him. Moreover, his attorney's strategy was, in part, to portray Johnson as a victim of the crossfire in a decades-long battle between Edwin Edwards and the federal government. Johnson worried that the surgery would jeopardize his ability to be tried with the entire group of defendants, and he was, in the words of his attorney, "hell-bent" on going to verdict with them.

As the trial progressed, Johnson initially reported no complaints about his health. On March 2, nearly two months into the trial, the government began presenting evidence related to the Jazz Scheme and Johnson's role in it. This evidence was particularly damaging to Johnson's defense. He was heard on tape threatening Jazz vice-president Mark Bradley ("Bradley"), who also took the stand against Johnson. Several newspaper articles noted the devastating effect of the tapes and Bradley's testimony, speculating that it was difficult to imagine how Johnson would be able to beat the charges. By March 13, the government had completed its presentation on the Jazz Scheme and moved on to the 15th Riverboat Scheme, a matter that did not relate to Johnson. The completion of the government's case

against Johnson marked the beginning of his continued absence from the trial. On March 14, Johnson left the proceedings early. When he had to leave early again the next day, attorney Fanning informed the district court that his client was having recurring trouble with his health. As he had done for all his absences since September 1999, Johnson waived his right to be present. Fanning further indicated that he had no intention of requesting a continuance or severance, as Johnson still wanted to continue with the trial.

Despite the increasing likelihood that his health would be a major obstacle to his ability to continue with the trial, thereby presenting serious trial management problems for the district court, Johnson refused to see a cardiologist. On March 16, Fanning asked for the district court's help in convincing his client to visit the cardiologist. The district court flirted with the possibility of forcing Johnson to undergo a medical evaluation as a condition of his bail, but ultimately decided against it. On March 17 and 21, Johnson yet again left the trial before the afternoon session, waiving his presence on both occasions. He never returned. At a March 21 conference, the first of several regarding Johnson's predicament, the district court learned that Johnson had not seen a cardiologist since September 1999. Nevertheless, Johnson insisted that he did not want a severance or mistrial because he still believed that it was in his best strategic interest to proceed with the trial.

The next day, the district court was informed that Johnson had finally visited a cardiologist, Joseph Deumite, M.D. ("Dr. Deumite"), who had recommended an urgent heart catheterization. The district court was also advised that, unlike every time in the past, Johnson was now refusing to waive his presence even though the government's case against him was finished. On March 23, the district court received a letter from Dr. Deumite stating that bypass surgery had been scheduled for March 28. After the operation was performed, the government moved for trial in absentia. Johnson, whose team was split on

strategic issues, sought a continuance.

On April 3, the district court held a conference to consider whether, and to what extent, Johnson could return from surgery to take part in his trial. After hearing from Dr. Sheely and Dr. Deumite, it concluded that the best available alternative was to grant Johnson's pending motion for a continuance. Johnson could use this time to recuperate, possibly enough to participate in the trial with certain accommodations. These accommodations, which included audio, video, or computer communication, would allow Johnson to monitor the trial from the comfort of his home. The government agreed to this plan, but the other defendants, worried about the delay and seeking a severance from Johnson, objected. At that point, Fanning withdrew the motion for continuance, moved for a mistrial, and rejected the district court's proposed accommodations as unacceptable. In essence, as the district court noted, Johnson's deliberately reckless course of conduct with regard to his health had created a major problem: the government was moving for trial in absentia, one defendant had withdrawn a motion for continuance and moved instead for mistrial, and the other defendants were seeking a severance. The district court's tentative solution was to allow testimony to continue on matters unrelated to Johnson, giving Johnson the right to recall any of the witnesses on cross examination.

The following day, the district court sua sponte reconsidered this ruling and postponed trial until April 10. Concerned that Johnson did not really support the motion that Fanning had filed, the district court ordered him to submit an affidavit confirming his consent to a mistrial. During chambers conferences on April 4 and 6, it was clear from the statements of Fanning, Fanning's co-counsel, Ernest Johnson, and Bobby Johnson's wife, Kim Johnson ("Mrs. Johnson"), that Johnson did not consent to a mistrial and instead wanted to go forward with the trial. Further complicating the situation, Fanning and Ernest Johnson suggested to the district court that Johnson might not be

competent as a result of his medication and post-operation depression. Competency aside, it was clear that the relationship and communication between Fanning and Johnson had badly deteriorated. Specifically, Johnson was angry at Fanning after reading press coverage of Fanning's reference to his client in open court as a "buffoon." Ultimately, the district court, without an affidavit from Johnson and unsure as to whether any such affidavit would be knowing and intelligent, denied the motion for mistrial and granted the government's motion for trial in absentia.

Before the trial resumed on the morning of April 10, Fanning filed another motion for mistrial, which was now accompanied by affidavit from Johnson. The district court denied this motion, but stressed that Johnson could still take advantage of the numerous accommodations it had previously offered him. These options included (1) providing Johnson with a more comfortable chair, (2) having a nurse present at all times to monitor Johnson's blood pressure and check on his overall health, (3) instituting longer and more frequent breaks in the trial, (4) allowing Johnson to participate through audio or video feeds, (5) providing Johnson and his counsel with real time transcription of trial proceedings, (6) permitting counsel to take as many recesses as necessary to confer with Johnson, (7) allowing communication equipment such as cell phones or beepers in the courtroom so that counsel could reach Johnson, (8) appointing an additional attorney to stay at home with Johnson to advise him from that location, (9) exercising discretion under Fed. R. Evid. 611 to allow Johnson to present his defense after the other defendants had completed their case, and (10) permitting Johnson to testify as the last witness in the trial. All of these options would be provided at the expense of the district court. Nevertheless, Johnson declined them.

Johnson did not return to court until after the jury delivered its verdict. Although offered a chance to testify in his defense, taking frequent or extended breaks as his health

required, he claimed that he was physically unable to do so. In all, the defendants were able to put on their case in a mere four days, as Edwin Edwards was the sole defendant to testify. Johnson also failed to offer any evidence in his defense. On April 17, the government presented its rebuttal case, which took less than one day. Before the government was allowed to make its closing argument in the Jazz Scheme, the district court contacted Dr. Deumite to obtain a progress report on Johnson's recovery. Even though Dr. Deumite had not seen Johnson in ten days, he told the district court that he expected him to have improved substantially. He also noted that most patients would feel ready to return to at least limited activity about three weeks after the operation, and that Johnson's recovery period was reaching that point. The government was then allowed to finish its closing arguments. The defendants, including Johnson, also made their closing arguments before the case was submitted to the jury. Following the jury's verdict finding him guilty on several counts, Johnson filed a motion for a new trial, arguing that the district court's decision to try him in absentia was erroneous. The district court held extensive hearings on the issue and ultimately denied the motion in an exhaustive opinion.

Johnson's absence from the final weeks of his trial implicates constitutional, statutory, and commonlaw rights. Rule 43 of the Federal Rules of Criminal Procedure codifies these rights, including due process, the Confrontation Clause, and the commonlaw right to be present. United States v. Navarro, 169 F.3d 228, 236 (5th Cir. 1999). Under Rule 43, the defendant's presence is not necessary if he becomes "voluntarily absent" after the commencement of the trial. Id. We review the district court's determination that Johnson's absence was voluntary for clear error. United States v. Davis, 61 F.3d 291, 302 (5th Cir. 1995). If we conclude that he voluntarily waived his right to be present at his own trial, we then consider whether the district court abused its discretion in deciding that there was a controlling public interest in continuing with the trial in his absence. See id.

The district court concluded that Johnson's absence was voluntary based on its finding that he made a deliberate tactical decision to postpone the surgery in order to gain the perceived strategic advantage of going to verdict with Edwin Edwards. It clearly viewed Johnson's failure to keep it informed of his medical decisions as consistent with the strategy to avoid severance at all costs. In light of the fact that the surgery he had in March 2000 was virtually the same operation that had been scheduled in September 1999, the district court was also suspicious of the timing of Johnson's decision, coming immediately after the government presented damaging evidence against him. Finally, it thought that his post-surgery legal maneuvers, including the shifting positions and his rejection of the district court's accommodations, were indicative of an unwillingness rather than an inability to continue with the trial.

Given the record evidence and the highly deferential standard under which we review the district court's determination, we cannot conclude that its finding of voluntary absence is clearly erroneous. In doing so, however, we note that Johnson's case presents a unique situation, not perfectly analogous to the caselaw relied on by either party. On one hand, several courts have considered scenarios wherein the defendant voluntarily absents himself from the trial by either exaggerating his symptoms or by exploiting a nonemergency condition in an obvious attempt to avoid trial. For example, in United States v. Pastor, 557 F.2d 930 (2d Cir. 1977), the Second Circuit based its conclusion that the defendant was voluntarily absent on its disbelief that he was experiencing the severe heart problems he claimed. See id. at 937 (concluding that defendant was "exaggerating his illness" in an effort to postpone the proceedings in his case). Similarly, in United States v. Barton, 647 F.2d 224 (2d Cir. 1981), the Second Circuit noted the disingenuous nature of the defendant's decision to undergo spinal surgery on the eve of trial despite the fact that his doctor had recommended the surgery seventeen months earlier. See id. at 238. The doctor stated that the operation was not performed on

an emergency basis and that the defendant's request for surgery came "out of the blue." Id. Both of these cases are consistent with the law of our circuit, which holds that a defendant cannot avoid trial by misrepresenting or exploiting his medical condition. See Davis, 61 F.3d at 302-03 (holding that the defendant's absence was voluntary where her complaints of symptoms were not supported by medical records).

In another line of decisions, however, Rule 43 has been held to prevent the trial court from continuing with proceedings when a legitimate medical emergency renders the defendant unable to be present. Johnson relies heavily on United States v. Novaton, 271 F.3d 968, 994-95 (11th Cir. 2001), in which the trial court continued with the proceedings after one of the defendants fell ill. The Eleventh Circuit vacated the conviction and remanded for a new trial, finding clear error in the district court's determination that the defendant's absence was voluntary. Id. at 997. In so holding, the Eleventh Circuit noted that after the defendant became ill, he and his counsel "cooperated commendably with the government and the district court" before eventually moving for a mistrial. Id. Accordingly, under the Novaton standard, which we find entirely reasonable, a sudden, incapacitating illness can render a defendant involuntarily absent, especially when he cooperates with the trial court to minimize the disruptive effect of his condition.

Johnson's case does not fit neatly into either one of these lines of decisions. Unlike the defendants' symptoms in Barton and Pastor, Johnson's symptoms were not a bluff, nor did his decision to have surgery come "out of the blue." Johnson's doctors testified that although his symptoms were the same in March as in September, they had become more acute and his coronary disease had progressed. The doctors also acknowledged the effect that a stressful trial would have on Johnson's heart condition. Even after the surgery, there was no indication that he was faking his symptoms, as his doctor testified that they did not believe that he was malingering during the recovery period. The

central distinction between Johnson's situation and the Barton-Pastor line, therefore, is that Johnson did not exploit his health condition to avoid a trial.

Nevertheless, this distinction does not make the district court's finding of voluntary absence clearly erroneous. There is ample support in the record for the district court's conclusion that Johnson's reckless course of conduct was part of a deliberate, tactical effort to avoid severance. Pursuant to this strategy, he avoided surgery in September 1999 even though two cardiologists had recommended it. He never told the district court that the surgery had been scheduled or canceled, thereby leaving it in the dark about the seriousness of his condition. During the months preceding the trial, he failed to see a cardiologist, apparently out of fear that he would be advised yet again that surgery was necessary. This refusal to seek proper treatment and failure to keep the district court informed of his condition deprived it of the ability to take actions to prevent Johnson's condition from jeopardizing its management of a long, complex, multi-defendant trial. As a result of the lack of cooperation from Johnson, the district court was unaware that a severance might be necessary. At the very least, the district court was unable to take Johnson's condition into account when it was determining how best to schedule the presentation of evidence over the course of the trial.

Further supporting the district court's conclusion that Johnson's absence was the result of an informed trial strategy was his post-operation legal maneuvering. Following his decision to finally undergo surgery after the government had completed a very strong case against him, he repeatedly refused to cooperate with the district court to minimize the disruption that his operation had caused. After initially seeking a continuance, he then pursued what could arguably be described as a boycott strategy. He moved unsuccessfully for a mistrial and then refused every accommodation that the district court offered him. Moreover, despite the fact that the government's case

against him had already been completed, he would not waive his presence even though he had done so on every other occasion. This lack of cooperation distinguishes the present case from Novaton, in which the defendant "cooperated commendably" with the trial court. Novaton, 271 F.3d at 997.

In essence, by the time Johnson finally left the trial for good, his absence was purely the result of his own decision to avoid necessary medical treatment and his failure to keep the district court apprised of his condition. Furthermore, there is considerable evidence that these actions were part of a strategy to go to verdict with Edwin Edwards. Although Johnson has the right under Rule 43 to be present at his trial, he is not entitled to unilaterally dictate its time and circumstances. See Davis, 61 F.3d at 302 (quoting United States v. Tortora, 464 F.2d 1202, 1208 (2d Cir. 1972)). Otherwise, a defendant with a serious health condition like Johnson's would have the ability to get two bites at the apple by refusing necessary medical treatment before trial, waiting to gauge the strength of the government's presentation, and ultimately obtaining a mistrial if he then decided to have the treatment. As we decline to interpret Rule 43 as a tool for such tactical maneuvering, we hold that the district court's determination that Johnson's absence was voluntary is not clearly erroneous.

Furthermore, we have little difficulty concluding that the district court did not abuse its discretion in continuing with the proceedings in Johnson's absence. The district court painstakingly chronicled the great expense and time invested in this long, complex, multi-defendant trial up to the point of Johnson's departure. The trial was entering its third month, and the burdens which would have been placed on the witnesses, jurors, defendants, and the district court far exceeded the public interest in postponing the proceedings or conducting a separate trial with Johnson present. See id. at 303 (finding no abuse of discretion in continuing with complex, multi-defendant trial despite voluntarily absent defendant). Accordingly, perceiving no

clear error in the district court's finding that Johnson was voluntarily absent, and discerning no abuse of discretion in its decision allowing the trial to proceed in his absence, we hold that there was no violation of Rule 43.

VI.

Eleven days after the jury began its deliberations in this case, the court dismissed Juror 68. The events leading up to that dismissal are as follows:

Juror 68 first came to the district court's attention about midway through trial when it received an anonymous phone call (the "Bias Call") accusing Juror 68 of (1) talking about the case at church functions; (2) being involved with Edwin Edwards in a medical transportation business; (3) seeking counseling from his pastor about the verdict; and (4) having a bias against Edwin Edwards. The court questioned Juror 68 about the allegations and made an initial determination that they were baseless. After the United States Marshals were able to identify the anonymous callers, the district court made a testimonial record of the allegations and again concluded that the allegations were baseless. In dismissing Juror 68, the court explained that the Bias Call had nothing to do with his decision.

Other events occurring during trial were slightly more troubling. First, the court observed that Juror 68 had, contrary to the court's instructions, held onto a piece of transcript that was distributed during trial (the "Transcript Incident"). Second, the court noticed that Juror 68 had, contrary to the court's instructions, written his juror number on an evidence binder that was later reused and handed to Edwin Edwards during his testimony (the "Binder Incident"). Despite these failures to follow the court's instructions, the court took no action, allowing deliberations to begin on April 24th.

On April 25th, a U.S. Marshal reported that he observed a dictionary and thesaurus in the jury room ("Dictionary Incident"). The court removed the books and re-instructed the jury not to bring any outside materials into the jury room. The court subsequently determined that it was Juror 68 who was responsible for bringing the books in and that the definitions of key terms, i.e., "conspiracy," "extortion" and "extort" were discussed. Again, the district court exercised restraint, declining to take further action.[10]

On April 27th, the district court was informed that Juror 68 had left the jury room in tears. Per the court's instructions, Juror 68 wrote a note ("Jury Note 7"), asserting that he has "doubts" and that he is being "intimidated" by other jurors, and suggesting that perhaps he should be dismissed. Again demonstrating restraint, the court denied the government's motion to dismiss Juror 68 without interviewing any of the jurors, and re-instructed the jury regarding their duty to deliberate.

On May 1st, the court received a note signed by the Foreman ("Jury Note 11"), alleging that an unidentified juror was refusing to participate in deliberations. The court questioned the Foreman about Jury Note 11,[11] determining that the note was

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[10] The district court noted that Juror 68 kept the dictionary at his work station despite the fact that another juror had told him that he was not supposed to use it.

[11] The note provided: "We feel a certain juror is biased and refuses to participate in deliberations. He has his mind made up, but will not discuss his reasoning. After many, many attempts by ALL jurors he still refuses. And he recently has gone as far as to tell a fellow juror to not speak to him at all. We do not know how to proceed with this juror's refusal to participate in deliberations."

referring to Juror 68. When questioned about the note, the Foreman mentioned, in trying to explain the note's allegation that Juror 68 was biased, that other jurors had seen Juror 68 on one occasion bring a note into the jury room and on another occasion remove sheets from his notebook from the jury room. In addition, there was subsequent testimony that Juror 68 was referring to the note during deliberations. Understandably, the district court expressed great concern at the possibility that Juror 68 was again bringing extrinsic material into the jury room.

Accordingly, on May 2nd the court held a hearing to question Juror 68 about Jury Note 11. Without informing Juror 68 about the Foreman's testimony, the court also asked Juror 68 whether he brought any notes in or out of the jury room. Juror 68 responded in the negative. The district court then interviewed the rest of the jurors about the two note incidents described by the Foreman; all but one of the jurors testified, in contradiction to Juror 68's testimony, to being aware of one or both of the incidents.

On May 3rd, over the prosecution's objection, the district court allowed Juror 68 an opportunity to explain the inconsistencies between his testimony and that of the fellow jurors. Juror 68 then partially recanted his previous testimony, admitting to bringing a note into the jury room and removing sheets from his notebook. In fact, he informed the court that, contrary to the court's instructions, he still had the note in his wallet. He explained that he remembered the two incidents after the court adjourned for the evening recess. But his recollection of the two incidents still differed materially from that of other jurors.

Following this testimony, the district court heard argument on the government's motion to dismiss Juror 68. As noted above, on May 5th the court dismissed Juror 68, issuing detailed findings of fact and conclusions of law. The district court based its dismissal of Juror 68 on its findings that Juror 68

had displayed an inability to follow the court's instructions and that, in his dealings with the court, Juror 68 was lacking in candor. With respect to the former finding, the district court cited the Binder Incident, the Transcript Incident, the April 25th dictionary incident and Juror 68's import and export of material from the jury room. With respect to the latter finding, the district court relied on his further finding that Juror 68 testified dishonestly on May 2nd when he denied importing and exporting material into the jury room. Finally, the district court made clear that it was not basing the dismissal on Juror 68's view of the evidence.

A.

District courts have discretion to dismiss jurors for just cause. United States v. Fryar, 867 F.2d 850, 853 (5th Cir. 1989). A district court abuses its discretion only "when its ruling is based on an erroneous view of the law or on a clearly erroneous assessment of the evidence." Whitehead v. Food Max of Miss., Inc., 277 F.3d 791, 792 (5th Cir. 2002); see also United States v. Virgen-Moreno, 265 F.3d 276, 288 (5th Cir. 2001) ("Unless the court's removal of the juror has prejudiced the defendant, we will not disturb the court's decision. Moreover, we will find prejudice only if the juror was discharged without factual support or for a legally irrelevant reason.") (citation omitted). Finally, "[u]nder the clearly erroneous standard, we may not reverse the district court's findings of fact unless the review of the relevant evidence leaves us with the definite and firm conviction that a mistake has been committed." Broussard v. United States, 989 F.2d 171, 178 (5th Cir. 1993).

The court found, based upon live testimony, that Juror 68 was unable to follow instructions and that he had displayed a lack of candor. The defendants do not contend that these two reasons for dismissal are legally irrelevant, see Fryar, 867 F.2d at 853 (affirming dismissal based on lack of candor); United States v. Vega, 72 F.3d 507, 512 (7th Cir. 1995) (affirming

dismissal based on failure to follow instructions). Instead, they appear to contend that the "lack of candor" and "inability to follow instructions" findings are clearly erroneous. We disagree.

With respect to his lack of candor, in its May 5, 2000 statement of reasons for dismissing Juror 68, the district court noted that it asked Juror 68 on May 2, 2000 to disclose any material of any type whatsoever that he brought into or took out of the jury room and to describe each item with particularity. When answering these questions on May 2nd, Juror 68 did not disclose the two incidents described by the Foreman and the other jurors on May 1st and 2nd. He did disclose the incidents on May 3rd when he was recalled, but the district court observed that his testimony seemed coached, noting that "some of his statements yesterday came out of a case." In fact, the court described Juror 68's May 3rd testimony as "shock[ing]." Furthermore, as noted above, Juror 68's May 3rd description of the various incidents was still inconsistent with that of other jurors'.[12] These inconsistencies also clearly support the "lack of candor" finding. Finally, the district court was rightly concerned with the fact that Juror 68 failed to correct his earlier misstatements until recalled and questioned by the court. Accordingly, we cannot say that the district court's finding of fact is clearly erroneous.

With respect to Juror 68's inability or unwillingness to follow instructions, the defendants apparently concede that his behavior with respect to the Dictionary Incident, Transcript Incident, Binder Incident and note incidents constituted a failure to follow instructions. The defendants argue, however, that these

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[12] For example, Juror 68 testified that he brought back all papers that he took out of the jury room. Other jurors testified that he brought back fewer pages. After observing the testimony, the district court expressly found the other jurors' version more credible.

mistakes were innocent, understandable and harmless. In light of the standard of review, their concession is fatal, regardless of their personal view of the seriousness of Juror 68's infractions.[13] Collectively, these failures to follow the court instructions, in addition to any observations the court may have made respecting Juror 68's demeanor, clearly support the district court's factual finding that Juror 68 was unable to follow its instructions.

Alternatively, the defendants vigorously contend that the abuse of discretion standard should not apply to dismissals occurring after commencement of deliberation. They argue that we should adopt a much more stringent standard in such cases, reversing whenever there is "a possibility that the dismissal was prompted by the juror's doubts about the defendant's guilt." In support of this proposition, the defendants rely primarily on United States v. Brown, 823 F.2d 591 (D.C. Cir. 1987), United v. Thomas, 116 F.3d 606 (2d Cir. 1997) and United States v. Symington, 195 F.3d 1080 (9th Cir. 1990). Their reliance on these cases is misplaced; the holdings are not nearly so broad.

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[13] Perhaps the strongest evidence of Juror 68's inability to follow instructions is the fact that, even after all of the questions about taking notes in and out of the jury room, Juror 68 continued to keep a note in his wallet.

Brown and Thomas[14] are "jury nullification"[15] dismissals. In both, the district court dismissed a juror during deliberations, concluding that juror was refusing to apply the substantive law. Brown, 823 F.2d at 595; Thomas, 116 F.3d at 611-12. After reviewing the records, the D.C. Circuit and Second Circuit, respectively, reversed, concluding that the evidence revealed a "substantial possibility" that the juror was motivated not by a desire to nullify, but by legitimate concerns about the sufficiency of the evidence. Brown, 823 F.2d at 596; Thomas, 116 F.3d at 623. These courts reasoned that the "substantial possibility" rule was necessary for nullification-based dismissals because, due to the sanctity of jury deliberations, the court will generally be unable to determine the true nature of the juror's difficulty. Brown, 823 F.3d at 596; Thomas, 116 F.3d at 622 ("Given the necessary limitations on a court's investigatory authority in cases involving a juror's alleged refusal to follow the law, a lower evidentiary standard could lead to the removal of jurors on the basis of their view of the sufficiency of the prosecution's evidence.").

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[14] Thomas relies substantially on Brown. See Thomas, 115 F.3d at 622 ("We adopt the Brown rule as an appropriate limitation on a juror's dismissal in any case where the juror allegedly refuses to follow the law--whether the juror himself requests to be discharged from duty or, as in the instant case, fellow jurors raise allegations of this form of misconduct.").

[15] Black's Law Dictionary defines jury nullification as "a jur[or's] knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case itself or because the result dictated by law is contrary to the jur[or's] sense of justice, morality, or fairness." Black's Law Dictionary 862 (7th ed. 1999).

In Symington, the Ninth Circuit, relying on Brown and Thomas, reversed a district court's juror dismissal that rested on the juror's refusal to deliberate, concluding that a reasonable possibility existed that the other jurors' problems with the dismissed juror were based upon that juror's view on the sufficiency of the evidence. Id. at 1088. As the government notes in its brief, however, the court in Symington also specifically emphasized the narrow nature of its holding:

> Cases subject to [reasonable probability] rule, we emphasize, are infrequent. In general, questions of juror bias or competence focus on some event...that is both easily identifiable and subject to investigation and findings without intrusion into the deliberative process. In those cases, the presiding judge can make appropriate findings and establish whether a juror is biased or otherwise unable to serve without delving into the reasons underlying the juror's views on the merits of the case. Since the district court's investigative authority is not constrained by the same jury secrecy concerns in those cases, the rule we announce here is not triggered. In cases where the allegations go to the quality and coherence of the juror's views on the merits, however, a trial judge may not be able to assess the juror's competence without exposing the content of the juror's views. The rule we announce today applies only to those cases.

Symington, 195 F.3d at 1087 n.6.

As the discussion of the cases above illustrates, Brown, Thomas and Symington stand for the limited proposition that a court may not dismiss a juror based upon its conclusion that the juror is failing to participate in the deliberative process in accordance with law unless there is no possibility that the juror's

problem stems from his view of the sufficiency of the evidence. Even at its broadest, the reasoning of these cases extends only to those dismissals where the juror's conduct cannot be evaluated without delving into the reasons underlying the jurors' views of the case, i.e., where the deliberative process has been implicated. As the dismissal in this case clearly did not require evaluation of such evidence, and in fact the district court took great pains to protect jury secrecy, the Brown, Thomas and Symington rule is inapplicable.

Alternatively, the defendants may contend that the focus should be on the motivation of the judge or party in initiating dismissal proceedings, i.e., dismissal is inappropriate whenever the court or a party initiates a motion to dismiss a juror based upon that juror's evaluation of the evidence. With respect to the latter, we do not suggest that the incentives of the parties seeking dismissal have no relevance, but we reject any suggestion that they are in any manner controlling. We assume that most litigants, while respecting their duty to the court, actively seek dismissal only of those jurors that they believe are adverse to their client's case. The motivation rule would functionally invalidate every party-initiated dismissal. As to the former, having carefully reviewed the entire record, we find no evidence that the district court dismissed Juror 68 for any reason other than those given.

B.

The defendants also assert that the district court's investigation of Juror 68's improper conduct was too broad in scope. Specifically, they appear to contend that once the district court had any inkling that the jurors were having trouble with Juror 68 because of his view of the evidence, any inquiry into his misconduct should have stopped. The defendants have cited no authority or provided any rationale for this proposition; as no rationale for it is apparent, we decline to adopt it.[16] While we recognize the district court's duty to protect the secrecy of jury deliberations, the district court continues to enjoy wide discretion to determine the proper scope of an investigation into whether just cause to dismiss a juror exists as long as the content of the deliberations is left undisturbed. See Fryar, 867 F.2d at 854; cf. Thomas, 116 F.3d at 623 ("Where the duty and authority to prevent defiant disregard of the law or evidence comes into conflict with the principle of secret jury deliberations, we are compelled to err in favor of the lesser of two evils--protecting the secrecy of jury deliberations at the expense of possibly allowing irresponsible juror activity.").

We conclude that the district court's investigation was not so broad in scope as to constitute an abuse of discretion. The district court did not interview any jurors until it received, on

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[16] The defendants do not explain or provide any authority for the proposition that a party's intent in seeking a dismissal should be controlling. They again cite to Brown and Thomas, but they do not explain their relevance. Brown and Thomas do note, and we agree, that district courts must be careful not to jeopardize the secrecy of deliberations by delving into the thought processes of the jurors. See Thomas, 116 F.3d at 618; Brown, 823 F.3d at 596. But the district court was very careful; it insisted that the jurors refrain from describing the content and method of their deliberations.

May 1st, the ambiguous Note 11 signed by the Foreman. As this was the second note indicating problems and the first including allegations of juror bias, it would seem the court was acting well within its discretion in attempting to determine what the problems were. It was in the process of interviewing the Foreman about the bias allegations that the district court discovered that Juror 68 was again violating the court's instructions. Understandably, the defendants do not contend that the court lacked discretion to investigate this evidence of misconduct.

C.

Finally, we note that there is a great deal of discussion in the briefs about whether Juror 68 was or was not a "hold-out" juror. This discussion is inapposite. Even assuming that Juror 68 was a hold-out juror, we have previously made clear that hold-out jurors are not immune from dismissal based upon just cause, see United States v. Huntress, 956 F.2d 1309, 1312-13 (5th Cir. 1992) ("Wilson in no way stands for the proposition that any evidence that the juror was a holdout raises a red flag.") (citing United States v. Wilson, 894 F.2d 1245, 1250 (11th Cir. 1990)), and the district court expressly disavowed any possibility that Juror 68 was being dismissed because of his view of the evidence. The defendants' implied assertion to the contrary is at best rank speculation. Accordingly, and in light of the discussion above, neither the dismissal of Juror 68 nor the investigation that led up to it provides a basis for reversal.

VII.

Brown, Johnson, and Stephen Edwards contend that there was insufficient evidence to support their convictions. At the district court, they moved for acquittal under Fed. R. Crim. P. 29, and we review the denial of that motion de novo. United States v. Alarcon, 261 F.3d 416, 421 (5th Cir. 2001). We must decide whether, viewing the evidence in the light most favorable to the government, a rational factfinder could have found the essential

elements of the crime beyond a reasonable doubt. United States v. Williams, 264 F.3d 561, 576 (5th Cir. 2001). We focus, therefore, on whether the verdict was reasonable, not whether we believe it is correct. Id.

A.

Brown challenges the sufficiency of the evidence supporting his extortion convictions, which also provided the basis for his RICO and RICO conspiracy convictions. Specifically, he argues that the evidence was insufficient on both of the government's extortion theories: extortion under color of official right and extortion by wrongful use of fear. Regarding the extortion under color of official right, Brown notes that in the usual case, this type of extortion is limited to the acts of public officials. See United States v. Tomblin, 46 F.3d 1369, 1382 (5th Cir. 1995). In cases where it has been applied to private persons, the conduct involved masquerading as a public official or aiding and abetting a public official's receipt of money. See id. Brown argues that there was no evidence that he either masqueraded as a public official or aided and abetted Governor Edwards' receipt of the money. Our review of the record, however, reveals ample evidence on which the jury could have reasonably based its verdict. Brown brought principals of LRGC/NORC to the Governor's Mansion to meet Edwin Edwards on several occasions. Moreover, Edwin Edwards assured them that "Cecil speaks for me," and "I will pass along any information through Cecil." These representations provided sufficient evidence for the jury to conclude that Brown's threats were made under color of official right.

The jury also had sufficient evidence on the theory of extortion by wrongful use of fear.[17] Extortion by wrongful use

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[17] Brown challenges the sufficiency of the evidence in support of the extortion charges relating to both the Jazz and

of fear includes fear of economic harm. Id. at 1384. This harm must take the form of a particular economic loss, not merely the loss of a potential benefit. Id. Brown argues that he did not exploit LRGC/NORC's fear of not receiving a license, as the evidence merely demonstrates that LRGC/NORC willingly paid him in the hope of receiving an extra benefit not available to others. He analogizes the situation to the facts of United States v. Garcia, 907 F.2d 380, 385 (2d Cir. 1990), in which the Second Circuit reasoned that a congressman who had taken money from a company could not be convicted of extortion absent any evidence that the company was making the payments out of fear. By paying the congressman, the Second Circuit held, the victim "was purchasing an advocate, not buying off a thug." Id. at 384. This was "not the stuff of which extortion is made." Id. at 385.

We disagree that this case is similar to Garcia. Instead, we find United States v. Collins, 78 F.3d 1021 (6th Cir. 1996), more instructive. In Collins, the Sixth Circuit refused to follow Garcia in light of evidence that the persons making the payments had indeed acted out of fear. Id. at 1030-31. Similarly, in the present case, the jury had ample evidence that the victims were acting out of fear of economic loss. For example, it could have credited the testimony of several persons who stated that as a result of Brown's threats, they believed that they would not even have an opportunity to obtain a license. One such person, Allan Morse, testified that: "[W]e all felt the same way. Everybody at every meeting felt that if these payments were not made, then it would automatically shut off any chance that we would receive a license." In light of this evidence we conclude that this is not a situation like Garcia, in which the payees were merely attempting to obtain preferential access and thought that, even

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LRGC/NORC schemes. His challenge to the extortion by wrongful use of fear relating to the Jazz scheme is identical to Johnson's argument and fails for the same reasons. See infra, Part VII.B.

without the payments, they would have a fair opportunity to compete for the license. To the contrary, unlike Garcia, this is the stuff of which extortion is made.[18]

Brown also attacks his mail and wire fraud convictions by arguing that there was no fraud because when he promised a license to LRGC/NORC, he firmly believed that he could deliver. In particular, he cites the testimony of Russ Meyer, the president of LRGC, who said that "he was absolutely convinced that what he was saying was a hundred percent true. I believe that Cecil felt at that time he was able to deliver what he said he could." This argument, however, overlooks the substantial evidence of fraud in his dealings with LRGC/NORC. Such evidence of deceit includes: (1) in January 1993, Brown convinced LRGC/NORC that they would receive not one, but two licenses in order to extract another $150,000 from the principals, (2) just days before the Gaming Commission vote, Brown surreptitiously entered into a "consulting agreement" with a competing applicant, promising that applicant a license, and (3) prior to the awarding of certificates of preliminary approval, Brown informed the companies that they would not be receiving a license because Governor Edwards simply had "too many friends." Given this evidence, we conclude that the jury's verdict should stand.

B.

Like Brown, Johnson argues that the evidence supporting

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[18] Brown's attack on his Travel Act conviction also fails for these same reasons. The basis of the Travel Act conviction is that Brown engaged in interstate travel in order to carry out his extortion. He does not dispute that he traveled to Missouri, only whether his actions constituted extortion. As his extortion challenge is unpersuasive, his attack on the Travel Act conviction fails.

the government's theory of extortion by wrongful use of fear relating to the Jazz scheme was insufficient. He contends that, at most, Jazz principals were placed in fear of the loss of a potential economic benefit, which is insufficient to support an extortion conviction. See Tomblin, 46 F.3d at 1384 (stating that "fear of losing a potential benefit does not suffice"). As with Brown, this argument is unavailing. The jury had ample evidence that Johnson capitalized on Jazz's fear that by not making the payments, it would lose the right to compete at all, not merely preferential treatment in an otherwise fair competition. For example, the jury heard Johnson threaten Jazz that if it did not give him a 12.5% cut, "that was all there was to it. You gone with Edwin. . . . And you know it too and [expletive] you'll be walking the streets." He also stated, "I just hate to see you all lose the license. I mean it's gone and you can write that off you know." At one point, Johnson brought Brown to meet Bradley and introduced Brown as his "partner." He renewed his demand of 12.5%, and pointed to Brown, saying, "You wasn't gonna get none, you was gone, 'til I got in there and got him involved." Bradley testified that he interpreted Johnson's and Brown's statements as threats that Jazz would not receive a license if it did not pay. Based on this evidence, the jury's verdict regarding the Jazz scheme extortion was well supported. Similarly, Johnson's Travel Act conviction, which he attacks on the same grounds, was supported by sufficient evidence of fear of economic loss.

Johnson also challenges the sufficiency of the evidence relating to his false statements conviction. To establish a false statements violation under 18 U.S.C. § 1001, the government must prove that a statement is false and material. See United States v. Wright, 211 F.3d 233, 238 (5th Cir. 2000). Although he does not dispute the jury's finding of falsity, Johnson argues that there was insufficient evidence of materiality. Succinctly stated, his argument is that materiality is lacking because the government never believed his lies. He contends that the FBI was already familiar with the tapes of Johnson's statements by the

time FBI Agent Rossman, to whom the statements were made, became involved in the Jazz investigation. In light of these tapes, Johnson's claims about Bradley were immediately known to be false and never had the effect of actually deceiving Agent Rossman. It is not necessary, however, for the misrepresentations to "have influenced the actions of the Government agency, and the Government agents need not have been actually deceived." United States v. Markham, 537 F.2d 187, 196 (5th Cir. 1976). The statements must only "have the natural tendency or capacity to deceive, affect, or influence the federal agency." United States v. Sidhu, 130 F.3d 644, 650 (5th Cir. 1997) (holding that false exculpatory statements can support conviction under § 1001). Our review of the record reveals that the jury had sufficient evidence to reach its conclusion that Johnson's statements were material. Agent Rossman testified that Johnson lied about issues central to the investigation, covered up his involvement, and attacked the credibility of a cooperating witness. In light of this testimony, the evidence was sufficient to support the false statements conviction.

C.

Stephen Edwards challenges the sufficiency of the evidence supporting his conviction for extortion as well as aiding and abetting in relation to the 15th Riverboat license, which involved the extortion of DeBartolo. DeBartolo and his business partner, Ed Muransky ("Muransky"), had formed DeBartolo Entertainment Corp. and entered into a joint venture with Hollywood Casino to apply for the last license. DeBartolo testified at trial that on the evening of March 5, 1997, the day before his final presentation to the Gaming Control Board, he met with Edwin Edwards at the Radisson Hotel. Edwin Edwards gave him a piece of paper, on which he had written the figure of $400,000, and told him that without the payment there would be a serious problem with the license. DeBartolo paid the $400,000 on March 12, 1997, the day before the Board was to vote. The next morning, Edwin Edwards called to inform him that the

Board had voted unanimously in favor of his application.

To be convicted of aiding and abetting, Stephen Edwards must have associated with the criminal venture, purposefully participated in it, and sought by his actions to make it succeed. United States v. Vaden, 912 F.2d 780, 783 (5th Cir. 1990). "An aider and abettor is liable for criminal acts that are the "'natural or probable consequence of the crime' that he counseled, commanded, or otherwise encouraged." Id. (quoting United States v. Fagan, 821 F.2d 1002, 1012 (5th Cir. 1987)). Stephen Edwards contends that there was no evidence that he committed any act or affirmative conduct that aided the extortion of DeBartolo. Relying on testimony by both DeBartolo and Muransky, he contends that the only proposal possibly rising to the level of extortion was the March 5, 1997 request, in which Stephen Edwards did not directly participate.

Despite Stephen Edwards' absence from the March 5, 1997 meeting, the evidence supports the government's contention that the meeting represented only the culmination of an ongoing scheme to extort DeBartolo. In September 1996, Stephen Edwards sent a "consulting agreement" to DeBartolo and Muransky that provided for payment to Stephen Edwards of a monthly $50,000 fee over a renewable five-year term. DeBartolo and Muransky refused to pay such an exorbitant fee and tore up the proposed agreement. After the March meeting, however, Edwin Edwards sent DeBartolo a retainer agreement under which Stephen Edwards would be paid $10,000 per month. The government characterized this as a sham arrangement to funnel payments to Edwin Edwards and Stephen Edwards. Indeed, DeBartolo's testimony supported this interpretation, as he stated that at the time he had no need for more lawyers or legal services.

Stephen Edwards dismisses the effect of these two consulting agreements. Regarding the first proposed contract, he notes that DeBartolo rejected it without subsequent threats from

Edwin Edwards or Stephen Edwards. There was no fear, therefore, of reprisals and consequently no extortion. As for the second agreement, Stephen Edwards points to the testimony of Muransky, who admitted that Stephen Edwards did provide some services and was probably entitled to some payment. These arguments are ultimately unpersuasive. We need not consider whether either one of the agreements, standing alone, might be insufficient to constitute extortion. Rather, the question we must answer is whether Stephen Edwards' involvement in these "sham" agreements entitled the jury to infer his knowledge of and participation in the entire scheme, which culminated in the $400,000 demand. In this respect, the evidence is sufficient. Both before the actual demand and immediately afterwards, DeBartolo was asked to sign agreements for services he did not need at a price that was unreasonable. The jury could have concluded that these agreements, which directly benefitted Stephen Edwards, were part of the scheme to extort DeBartolo. Moreover, there was evidence that Edwin Edwards and Stephen Edwards worked in close cooperation on the 15th Riverboat Scheme, such as a taped conversation during which Edwin Edwards told Stephen Edwards on March 10, 1997: "we've come to the point now where if this thing is gonna work we have to have an understanding . . . and I want to tell him that I want one percent of gross gaming revenue as defined by the statute." In light of this evidence and the deferential sufficiency standard, we conclude that the jury's verdict should stand.

VIII.

As noted above, the district court, relying on Cleveland, dismissed Counts 20-22 and 25-27 after the jury verdict as against Edwin Edwards and Stephen Edwards. Martin, Brown and Johnson were not charged with these Counts. Count 20 charged Edwin Edwards and Stephen Edwards with a mail and wire fraud conspiracy. Counts 21-22 and 25-26 charged Edwin Edwards and Stephen Edwards with wire fraud and Count 27 charged Edwin Edwards and Stephen Edwards with mail fraud.

All of these counts related to the 15th Riverboat License Scheme. Again relying on Cleveland, the district court dismissed Count 6 as against Johnson. Edwin Edwards was acquitted on this charge; Martin, Brown and Stephen Edwards were not charged. Count 6 related to the Jazz Scheme.

Predicate act "5A" of Count 1, the RICO count, corresponds to Count 21. Predicate act "5B" corresponds to Count 22. Predicate act "5E" corresponds to Count 25. Predicate act "5F" corresponds to Count 26. Predicate act "5G" corresponds to Count 27. Predicate act "6" corresponds to Count 34.

The defendants contend that their convictions were tainted by evidence that would have been inadmissible "but for" the counts premised upon the "license as property" theory rejected by Cleveland, i.e., there was a prejudicial spillover effect.

In the alternative, they argue that the dismissal of the mail and wire fraud counts [Counts 20-22 and 25-27] pursuant to Cleveland also requires dismissal of the money laundering count [Count 34], because the jury could have relied upon Counts 20-22 and 25-27 in concluding that the money used in the financial transaction underlying Count 34 involved the proceeds of unlawful activity. In addition, the defendants contend that the jury verdict on the RICO and RICO conspiracy counts [Counts 1 and 2] is tainted and must be reversed because the jury may have relied on predicate acts 5A-B, 5E-G and 6 in concluding that the defendants conducted the affairs of their RICO enterprise through a pattern of racketeering activity.

Finally, Martin contends that his own conviction on Counts 1 and 2 must be reversed because the jury only found him responsible for two predicate acts, one of which was Count 34 [predicate act 6].

A.

Both the government and the defendants fail to suggest a standard for reviewing the "spillover" claim or cite any Fifth Circuit "spillover" cases.[19] Generally, this Court uses the term "spillover" in discussing whether a district court abused its discretion in denying a motion for severance. See, e.g., United States v. Peterson, 244 F.3d 385, 393 (5th Cir. 2001) (noting that to be entitled to reversal in this context "the defendant must show that: (1) the joint trial prejudiced him to such an extent that the district court could not provide adequate protection; and (2) the prejudice outweighed the government's interest in economy of judicial administration."); United States v. Pofahl, 990 F.2d 1456, 1483 (5th Cir. 1993) (noting in this context that "the mere presence of a spillover effect does not ordinarily warrant severance"). This circuit has never addressed whether spillover from invalid claims can be a basis for granting a new trial. Compare United States v. Vebeliunas, 76 F.3d 1283, 1293 (2d Cir. 1996) (applying a three-factor test to this type of "retroactive misjoinder" challenge to determine whether the defendant was prejudiced and noting "[i]n cases where the vacated and

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[19] The defendants do cite two cases in support of their argument: United States v. DiNome, 954 F.2d 839 (2d Cir. 1992); United States v. Tellier, 83 F.3d 578, 582 (2d Cir. 1996)(citing DiNome). Neither cases, however, provides a standard of review for a "spillover" challenge and each is distinguishable from the present case. See Tellier, 83 F.3d at 581-582 (reversing a Hobbs act claim, citing prejudicial "spillover" where evidence on unproved RICO counts should not have been admitted); DiNome, 954 F.2d at 844-845 (noting that typically "spillover" is a term used in the severance context and concluding that the defendants' trial should have been severed after the court granted a Rule 29 motion on RICO claims where the RICO evidence would not have been otherwise inadmissible against them).

remaining counts emanate from similar facts, and the evidence introduced would have been admissible as to both, it is difficult for a defendant to make a showing of prejudicial spillover."), United States v. Murphy, 836 F.2d 248, 255-56 (6th Cir. 1988) (finding no prejudice where remaining convictions were "conceptually a[nd] totally separate type of crime"), United States v. Stefan, 784 F.2d 1093, 1101 (11th Cir. 1986) (applying two-factor test) with United States v. Holzer, 840 F.2d 1343, 1349 (7th Cir. 1988) ("No rule of evidence is violated by the admission of evidence concerning a crime of which the defendant is acquitted, provided the crime was properly joined to the crime for which he was convicted and the crimes did not have to be severed for purposes of trial. It makes no difference, moreover, whether the jury acquits on some counts or the trial or reviewing court sets aside the conviction."). While we are willing to acknowledge that perhaps a grant of a new trial might be appropriate in some cases of "retroactive misjoinder," that case is not before us. At a minimum, drawing from our severance cases and authority from other circuits, the defendants must show that they experienced some prejudice as a result of the joinder of the invalid claims, i.e., that otherwise inadmissible evidence was admitted to prove the invalid fraud claims. They have not, and cannot do so. Any evidence admitted on these counts, presumably evidence that Edwin and Stephen Edwards were attempting to influence the 15th Riverboat License vote, was clearly relevant to the extortion counts; the fact that the defendants were manipulating the licensing process tends to prove that they promised those they extorted that they would do so.[20] Furthermore, it was admissible on the government's honest

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[20] Cf. United States v. Holzer, 840 F.2d 1343, 1349 (7th Cir. 1988) ("No rule of evidence is violated by the admission of evidence concerning a crime of which the defendant is acquitted, provided the crime was properly joined to the crime for which he was convicted and the crimes did not have to be severed for purposes of trial. It makes no difference, moreover, whether the

services theory. Finally, though unnecessary, this evidence was also admissible as against Martin because the 15th Riverboat License extortion scheme was part of the RICO conspiracy, of which Martin was charged and convicted. Cf. Salinas v. United States, 522 U.S. 52, 64 (1997) (holding that individual coconspirator does not need to personally commit predicate acts to be convicted of a RICO conspiracy).

B.

At the close of evidence, the district court instructed the jury that it could convict the defendants on Count 34 if it found, in part, that he knowingly conducted a financial transaction involving the proceeds of extortion, mail fraud or wire fraud. In addition, the district court instructed the jury as to Counts 21-26 and 28-30 that it could convict Edwin Edwards, Stephen Edwards, Gregory Tarver and Ecotry Fuller of wire fraud on a "license as property" theory, i.e., if it found, in part, that they knowingly devised a scheme to deprive the State of Louisiana of property by obtaining the 15th Riverboat License by means of false or fraudulent pretenses. Accordingly, at least in theory, the jury was instructed that it could convict the defendants on Count 34 if it found that they knowingly conducted a financial transaction involving the proceeds of a "license as property" fraud. Therefore, in light of Cleveland, part of the Count 34 instruction was legally invalid.

However, the defendants do not identify a place in the record where they objected to the money laundering instruction,[21]

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jury acquits on some counts or the trial or reviewing court sets aside the conviction.").

[21] The defendants cite to a pretrial motion to dismiss filed by Tarver. Even assuming, arguendo, that this motion, filed September 15, 1999, could have properly raised an objection to

and our independent review of the record has found no objection. Accordingly, we review the challenge only for "plain error." See United States v. Jimenez, 256 F.3d 330, 340 (5th Cir. 2001); Fed. R. Crim. P. 30; Fed. R. Crim. P. 52; see e.g. Johnson v. United States, 520 U.S. 461 (1997) (reviewing faulty instruction for plain error despite the fact that settled law at the time of trial supported the instruction).

"We follow a four step analysis for 'plain error' review: (1) there must be an 'error,' i.e., a 'deviation from a legal rule,' that has not been waived; (2) the error must be 'plain,' i.e., 'clear' or 'obvious' under current law; (3) the error must 'affect substantial rights,' i.e., it must have affected the outcome of the proceeding; and, (4) even if the error was 'plain' and 'affected substantial rights,' the Court of Appeals, exercising its discretion, should correct the error only if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" United States v. Burton, 126 F.3d 666, 674 (5th Cir. 1997).

This circuit recognizes that a conviction must be reversed when disjunctive legal theories, one of which is legally insufficient, are submitted to the jury, the jury renders a general verdict of guilty and it is impossible to tell which ground the jury selected. See Tomblin, 46 F.3d at 1385; cf. Yates v. United States, 354 U.S. 298, 312 (1957) (originating the doctrine), overruled on other grounds in Burks v. United States, 437 U.S. 1 (1978).

However, Yates does not control every instance where a disjunctive instruction with a legally insufficient component is given. In Griffin v. United States, 502 U.S. 46 (1991), the Court

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the jury instructions given on April 24, 2000, the motion did not mention Count 34. This is not surprising in light of the fact that Tarver was not charged with money laundering.

held that a conviction should stand where a jury is instructed that it can convict on two theories, one of which is unsupported by the evidence. It reasoned:

> Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law--whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error. Quite the opposite is true, however, when they have been left the option of relying upon a factually inadequate theory, since jurors are well equipped to analyze the evidence.

Griffin, 502 U.S. at 59.

In United States v. Wilson, 116 F.3d 1066, reversed on other grounds United States v. Brown, 161 F.3d 256, 257 n.1 (5th Cir. 1998) (en banc), we held that Griffin, not Yates, applies where a disjunctive instruction with a factually insufficient component is given, even if that component is also legally insufficient. Wilson, 116 F.3d at 1080; see also Yates, 354 U.S. at 312 ("In these circumstances we think the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected.") (emphasis added). That is exactly what we have here. The defendants have never identified, despite the government's urging, any evidence in the record that would have supported a jury finding that they laundered the proceeds of a "license of

property" fraud scheme,[22] and our independent review of the record has found none. Accordingly, we find no reversible error, plain or otherwise.

C.

To restate, the defendants contend that reversal is required as a matter of law where the jury finds a pattern of racketeering based, in part, on predicate acts that have not been proven. This proposition has already been rejected by this circuit. See United States v. Peacock, 654 F.2d 339, 348, vacated in part on other grounds, 686 F.2d 356 (5th Cir. 1982); see also Brennan v. United States, 867 F.2d 111, 114-16 (2d Cir. 1989); United States v. Cardall, 885 F.2d 656, 682 (10th Cir. 1989); United States v. Pepe, 747 F.2d 632, 665-68 (11th Cir. 1984).

United States v. Marcello, 876 F2d 1147 (5th Cir. 1989), cited by the defendants, is distinguishable. In Marcello, it was impossible for the panel to determine whether the jury found two valid predicate acts because the jury returned a general verdict. Id. at 1153. That is not the case here. The jury in this case was given a special verdict form with respect to the RICO counts. In addition to predicate acts 5A-B, 5E-G (those tainted by the "license as property" theory), the jury expressly found proven

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[22] The defendants effectively conceded this point before the district court. In their reply to the government's assertion in its post-verdict memorandum on the effect of Cleveland that no such evidence existed, the defendants wrote only "If the government now takes the position that it was impossible for the jury to base its money laundering verdict on the mail and wire fraud related counts, then why did the Government present that theory to the grand jury in the indictment and why did the grand jury decide to accept that theory and charge the mail and wire fraud related counts as one of the sources of the laundered funds?".

predicate acts 4A, 4B and 4C and 6 as to Stephen Edwards, Edwin Edwards and Martin and predicate acts 3A, 3B, 3C and 3D as to Edwin Edwards and Stephen Edwards. Cf. United States v. Biaggi, 909 F.2d 662, 692 (recognizing that "the jury's findings of two predicate acts, lawfully constituting a RICO pattern, and of the other elements of a RICO offense, will permit affirmance of a RICO conviction notwithstanding the invalidation of other predicate acts" but concluding, without citing authority or providing reasoning, that affirmance was inappropriate because in their case the invalid allegations "dominated this prosecution."); United States v. Delano, 55 F.3d 720, 728 (2d Cir. 1992) (same) (citing Biaggi).

D.

Finally, Martin contends that reversal of his Count 34 conviction requires that his RICO convictions be reversed because the jury will have found him to have committed only one Racketeering Act. This argument is wholly dependant on our reversal of Martin's conviction on Count 34. Because we will affirm Martin's Count 34 conviction, his argument fails. We note, however, that even had we reversed Martin's conviction on Count 34, his RICO conspiracy conviction clearly would have been unaffected. See Salinas, 522 U.S. at 64.[23]

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[23] Johnson also contends that Cleveland invalidates his extortion conviction because after Cleveland, loss of a license is not an economic harm. We reject this unsupported assertion. Cleveland has nothing to do with extortion and therefore has no effect on the law respecting what constitutes a threat of economic harm. As discussed above, the inability to compete for a license clearly constitutes an economic loss regardless of whether a license is property in the hands of the government. See Collins, 78 F.3d at 1030-31.

IX.

Pursuant to a special verdict form, the district court found Stephen Edwards jointly and severally liable for a $1.8 million forfeiture award. Of that $1.8 million, $327,000 was attributed to the LRGC/NORC scheme. The jury had earlier found that the government had failed to prove any predicate acts relating to the LGRC/NORC scheme as to Stephen Edwards or Edwin Edwards.

At sentencing the district court, applying U.S.S.G. §§ 2C1.1 & 2F1.1, concluded that the loss attributable to Stephen Edwards was $4,117,000, resulting in an upward adjustment of 13 levels. Of this $4,117,000, $2,217,000 was attributed to the Players Scheme and $1.9 million was attributed to the other schemes.[24] The $2,217,000 figure included $200,000 that was allegedly extorted from Patrick Madamba, $180,000 paid in legal fees to Stephen Edwards and payments (of some amount not specified by the briefs) made to Shetler by "Jebaco" and "Beeber." All of the money attributed to the Players Scheme (except the $180,000 in legal fees aforementioned) was paid first to Shetler; at Shetler's sentencing, Judge Parker found Shetler responsible only for between $300,000 and $500,000 in loss.

Stephen Edwards contends that it would violate his Fifth Amendment right to due process and Eighth Amendment protection against excessive fines to base a forfeiture order on conduct that the jury found "not proven."

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[24] The sum of $1.5 million was attributed to the Treasure Chest Scheme, consisting of an intended 15 monthly payments of $100,000. Four hundred thousand dollars was attributed to the 15th Riverboat License Scheme. Though unchallenged, these amounts are supported by the record.

Stephen Edwards further contends that the $2,217,000 figure was overstated. In support of this contention, he asserts that it is inconsistent for Judge Parker to find $300,000 to $500,000 in loss from the Players Scheme and Judge Polozola to find $2,217,000. In addition, Stephen Edwards asserts that the record does not support a finding that the three classes of payments mentioned above (the Madamba payments, legal fee payments, and Jebaco and Beeber payments) were the proceeds of illegal activity.

A.

The $1.8 million forfeiture amount constitutes the amount the jury found to have been the proceeds of racketeering activity. Stephen Edwards was found to have been a member of that racketeering conspiracy. Accordingly, the district court appropriately entered an order of forfeiture, for which Stephen Edwards was solidarily liable. See United States v. Corrado, 286 F.3d 934, 937-38 (6th Cir. 2002) (Corrado II) (holding that a RICO forfeiture verdict may provide for joint and several liability and that conspirators are liable even for proceeds of crimes not part of the conspiratorial enterprise); see also United States v. Simmons, 154 F.3d 765, 769-770 (8th Cir. 1998) (providing for joint and several liability); United States v. Hurley, 63 F.3d 1, 22 (1st Cir. 1995) (same); United States v. Caporale, 806 F.2d 1487, 1507 (11th Cir. 1986) (same).

Contrary to his assertion, Stephen Edwards is not being punished for committing the substantive acts found to be "not proven." He is being punished for conducting the affairs of an enterprise through a pattern of racketeering activity. The jury found that he and Brown were RICO co-conspirators and that Brown, as part of that conspiracy, extorted money pursuant to the LGRC/NORC scheme. Accordingly, the money extorted constitutes the proceeds of the enterprise. Therefore, Stephen Edwards is appropriately held responsible for that loss. Though

not involving an "acquittal,"[25] the opinion in United States v. Corrado, 227 F.3d 543 (6th Cir. 2000) (Corrado I) is instructive. In Corrado I, two mobsters convicted of RICO asserted that they should not be liable for any forfeiture award because they did not participate in any of the illegal conduct, received none of the proceeds and the gangsters who committed the acts and received the proceeds were acting to further their own agenda. The Sixth Circuit rejected these arguments, reasoning that "it is not determinative that the defendant committed the crime to further his own agenda, if indeed he was only able to commit the crime by virtue of his position within the enterprise." Id. at 553-55. The only requirement is that the criminal conduct be foreseeable. Id. at 558. Similarly, Brown's ability to extort money from LRGC/NORC clearly came from his position in the RICO enterprise. Without his connection to the enterprise, his threats would have lacked substance.

B.

U.S.S.G. § 2C1.1 provides a base offense level of 10 for extortion. This level is to be increased by the corresponding number of levels provided by U.S.S.G. § 2F1.1, which provides for a thirteen-level increase for loss amounts between $2,500,001 and $5,000,000.

Although the determination of loss for the purposes of U.S.S.G. § 2F1.1 is a factual finding reviewed for clear error, the district court's choice of the method by which losses are determined involves an application of the sentencing guidelines, which is reviewed de novo. United States v. Saacks, 131 F.3d 540, 542-43 (5th Cir. 1997).

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[25] As the LGRC/NORC predicates were not charged as substantives offenses, technically Stephen Edwards was not acquitted.

Stephen Edwards does not contend on appeal that the $1.9 million figure found by the district court with respect to the other schemes is inaccurate. In addition, the jury found, and the evidence supports, a finding that Shetler funneled at least $550,000 in extortion proceeds from the Players Scheme to Edwin and Stephen Edwards. There was substantial evidence in the record that Shetler kept at least one-third of all the proceeds of the Players Scheme. Extrapolating from this evidence, this would amount to, at minimum, an additional $225,000 that Shetler obtained through the extortion scheme, which constitutes part of the actual loss caused by the scheme. As the sum of $225,000, $550,000 and $1.9 million exceeds $2,500,001, any error by the district court in including additional monies, assuming one occurred, was harmless. Finally, as to Judge Parker's finding that Shetler was responsible for only $300,000 to $500,000 in loss, Stephen Edwards fails to cite any authority for why this finding, which relied on a completely different record, is legally significant.

X.

At sentencing, the district court found that Johnson intended to extort a 12.5% interest in the Belle of Baton Rouge, Jazz's riverboat project. It then calculated Johnson's "intended loss" for the purposes of the sentencing guidelines by summing 12.5% of $11,105,000, the Belle's net profits,[26] with 12.5% of $55.9 million, the amount paid by an outside party for Jazz Enterprises' interest in the Belle and the dockside development Catfish Town. In addition, the district court adjusted Johnson's offense level for obstruction of justice pursuant to U.S.S.G. § 3C1.1.

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[26] In his brief, Johnson erroneously asserts that the pre-sentence report recommended a finding that there was $5.7 million in profits.

Johnson contends that the record does not support the district court's finding that he intended to extort a 12.5% interest in the entire Jazz riverboat project, including Catfish Town. Instead he contends that the record supports a finding that he intended to extort a 12.5% interest only in the casino. In addition, Johnson contends that the district court erroneously failed to require the government to provide evidentiary support for the pre-sentence reports' $11,105,000 and $55.9 million figures.[27] Finally, Johnson contends that the record does not support an adjustment for obstruction. He bases this contention on the fact that the government knew his statements were false at the time they were made. Therefore, he concludes, his false statement did not actually obstruct justice.

A.

Again, the district court's loss finding is reviewed for clear error. United States v. Loe, 262 F.3d 427, 437 (5th Cir. 2001). "In order to satisfy this clear error test all that is necessary

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[27] Johnson may also contend that the loss figure is incorrect because Jazz could not have delivered a 12.5% interest in the Belle because it only owned 10%. To the extent that Johnson is making this argument, the government is correct that nothing in § 2F1.1 n.7 requires that the defendant be capable of inflicting the loss he intends. See United States v. Ismoila, 100 F.3d 380, 396 (5th Cir. 1996) (citing United States v. Robinson, 94 F.3d 1325, 1328 (9th Cir. 1996) for the proposition that "§ 2F1.1 does not require the loss the defendant intended to inflict be realistically possible"); but see United States v. Watkins, 994 F.2d 1192, 1196 (6th Cir. 1993) (holding, contra, that defendant must have been able to cause the loss); United States v. Galbraith, 20 F.3d 1054 (10th Cir.1994) (same). Cf. United States v. Geevers, 226 F.3d 186, 195 (3d Cir. 2000) (characterizing Galbraith and Watkins as the minority rule and declining to follow them).

is that the finding be plausible in light of the record as a whole." United States v. Humphrey, 104 F.3d 65, 71 (5th Cir. 1997). "A 'loss' under [U.S.S.G. 2F1.1] means the actual or intended loss to the victim, whichever is greater. Further, the amount of loss need not be determined with precision. The district court need only make a reasonable estimate given the available information." United States v. Izydore, 167 F.3d 213, 222 (5th Cir. 1999).

Finally, "[t]he presentence report is considered reliable evidence for sentencing purposes." United States v. Clark, 139 F.3d 485, 490 (5th Cir. 1998). "If no relevant affidavits or other evidence is submitted to rebut the information contained in the PSR, the court is free to adopt its findings without further inquiry or explanation." United States v. Jefferson, 258 F.3d 405, 413 (5th Cir. 2001).

The district court's finding that Johnson intended to extort 12.5% of the entire Jazz project is not clearly erroneous. Bradley, the Jazz principal extorted by Johnson, testified to this fact. Furthermore, the court was entitled to adopt the pre-sentence reportÆs $11,105,000 and $55.9 million figures without further inquiry as Johnson failed to offer rebuttal evidence.[28]

B.

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[28] In addition, we note that, contrary to his position on appeal, Johnson did not explicitly or implicitly object to the figures themselves, he objected only to using them in calculating the loss, e.g., as discussed, he contended that 12.5% of $55.9 million was not the intended loss because he did not intend to extort an interest in the entire project, not that $55.9 million was not the sale price of the entire project. Accordingly, Johnson had the burden of demonstrating plain error. See United States v. Fierro, 38 F.3d 761, 774 (5th Cir. 1994).

"A finding of obstruction of justice under § 3C1.1 is a factual finding reviewed for clear error. However, we review the district court's interpretation or application of the sentencing guidelines de novo." United States v. Upton, 91 F.3d 677, 687 (5th Cir. 1996).

The government correctly asserts that the obstruction enhancement was supported by Johnson's conviction on the false statements counts. U.S.S.G. § 3C1.1 & Application n. 4 ("This adjustment also applies to any other obstructive conduct in respect to the official investigation, prosecution, or sentencing of the instant offense where there is a separate count of conviction for such conduct."); United States v. Crisci, 273 F.3d 235, 240 (2d Cir. 2001) ("In this case, Crisci's separate count of conviction for making false statements to the FBI agent investigating the instant offense compelled the district court to apply Section 3C1.1.") (citing Application note 4); United States v. Herr, 202 F.3d 1014, 1017 (8th Cir. 2000). As discussed in Section F, supra, the false statements convictions are supported by the evidence.[29] Accordingly, the adjustment was proper.

United States v. Surasky, 976 F.2d 242, 245 (5th Cir. 1992), cited by Johnson, is distinguishable because there was no false statement conviction. In Surasky, this Court held "that a false statement made by a defendant to law enforcement officers cannot constitute obstruction of justice unless the statement

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[29] We note that § 3C1.1 is clearly applicable to cases where the defendant does not actually obstruct justice. U.S.S.G. § 3C1.1 ("If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (I) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by 2 levels.") (emphasis added).

obstructs or impedes the investigation at issue significantly." Id. In so holding, the panel relied on the language of then-Application Note 4(b),[30] which provided that "making false statements, not under oath, to law enforcement officers, unless Application Note 3(g) above applies" is not conduct warranting application of the enhancement, and the language of then-Application Note 3(g),[31] which instructs that "providing a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigations or prosecution of the instant offense" does warrant application of the enhancement. However, Application Note 5 instructs that it applies only absent conviction. See U.S.S.G. § 3C1.1 Application Note 5 ("Some types of conduct ordinarily do not warrant application of this adjustment.... However, if the defendant is convicted of a separate count for such conduct, this adjustment will apply and increase the offense level for the underlying offense...).

XI.

Martin contends that we must vacate the forfeiture order as to him if we vacate his money laundering and RICO convictions. He also contends that it should be vacated because he speculates based on his jury argument and the amount of the forfeiture award that the jury did not intend to award a forfeiture verdict as to him.

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[30] The application notes were subsequently amended. This language now appears in Application Note 5(b).

[31] This language now appears in Application Note 4(g).

Because we affirm Martin's RICO and money laundering convictions, the former challenge fails. As to the latter, the jury explicitly found Martin liable on the forfeiture verdict. Martin's speculative attack, which is unsupported by authority or a record citation and contrary to the verdict, is frivolous.

XII.

Finally, the defendants contend that various errors infected the entire prosecution, violating due process. The government interprets this argument as urging reversal based on judicial bias, but the defendants' assert in reply that they do not seek reversal based solely on judicial bias.[32]

We construe the defendants' argument as asserting that reversal is appropriate for "cumulative error." United States v. Williams, 264 F.3d 561, 572 (5th Cir. 2001) ("We have previously recognized the so-called cumulative error doctrine under which an aggregation of non-reversible errors (i.e., plain errors failing to necessitate reversal and harmless errors) can yield a denial of the constitutional right to a fair trial.") (citation omitted). See also United States v. Sepulveda, 15 F.3d 1161, 1195-96 (1st Cir. 1993) (explaining the cumulative error doctrine).

Many of the "errors" cited by the defendants are unbriefed. These issues have been waived. See United States v. Thames, 214 F.3d 608, 611 n.3 (5th Cir. 2000); see also Fed. R.

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[32] The defendants' reluctance to rely on judicial bias is not surprising in light of their citation to United States v. Jordan, 49 F.3d 152, 158 (5th Cir. 1995). In Jordan this Court made clear that the failure of a judge to recuse herself pursuant to 28 U.S.C. § 455(a) does not provide a basis for reversal absent evidence of actual bias or a nexus between actual errors and the appearance of bias. See id. at 158.

App. P. 28(a)(9)(A) (appellant's brief must contain his "contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies."). Because, based upon our discussion above, the defendants' arguments on appeal establish only two unrelated and relatively insignificant errors, there are no errors to cumulate. See United States v. McIntosh, 280 F.3d 479, 484 (5th Cir. 2002).

CONCLUSION

For the foregoing reasons, the defendants' convictions and sentences are hereby AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-30036

U.S. Court of Appeals
FILED
Sep 23 2002
Charles R. Fulbruge III
Clerk

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

EDWIN EDWARDS; STEPHEN EDWARDS;
CECIL BROWN; ANDREW MARTIN;
BOBBY JOHNSON

Defendants - Appellants

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Appeals from the United States District Court for the
Middle District of Louisiana, Baton Rouge

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ON PETITIONS FOR REHEARING
AND REHEARING EN BANC

(Opinion August 23, 2002 5 Cir., _____, _____ F.3d _____)

Before HIGGINBOTHAM, WIENER, and BENAVIDES, Circuit Judges.

PER CURIAM:

(X) The Petitions for Rehearing as to Edwin Edwards, Stephen Edwards, and Andrew Martin are DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (Fed. R. App. P. and 5th Cir. R.), the Petitions for Rehearing En Banc are also DENIED.

( ) The Petitions for Rehearing as to Edwin Edwards, Stephen Edwards, and Andrew Martin are DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (Fed. R. App. P. and 5th Cir. R. 35) the Petitions for Rehearing En Banc are also DENIED.

( ) A member of the court in active service having requested a poll on the reconsiderations of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc as to Edwin Edwards, Stephen Edwards, and Andrew Martin are DENIED.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

Judges Edith B. Clement and Carl E. Stewart did not participate in the consideration of the petitions for rehearing en banc.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA CRIMINAL ACTION

VERSUS

EDWIN EDWARDS, ET AL. NO. 98-165-B-M2

RULING ON DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL OR NEW TRIAL

The defendant shave filed a motion for a post-verdict judgment of acquittal or alternatively, an amended motion for a new trial.[1] At the close of all of the evidence, the defendants also filed a motion for a judgment of acquittal which was taken under advisement by the court.[2] The government has opposed these motions.[3]

After the defendants' motions were filed, the United States Supreme Court rendered its decision in Cleveland v. United States.[4] This Court, on its own motion, requested that the parties submit briefs on the issue of whether the Cleveland decision affected the guilty verdicts previously rendered in this case. After hearing oral arguments, the Court, without objection

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[1]Rec. Doc. No. 1467; Rec. Doc. No. 1470.

[2]Rec. Doc. No. 1306. Ecotry Fuller and Greg Tarver also filed motions for judgment of acquittal at the close of all of the evidence. The jury found these defendants not guilty. Therefore, these motions are now moot insofar as they pertain to Ecotry Fuller and Greg Tarver.

[3]Rec. Doc. No. 1496; Rec. Doc. No. 1492.

[4]531 U.S. ___, 121 S. Ct. 365 (2000).

from the United States, granted a new trial on the following counts, for the following defendants:

Bobby Johnson - Count 6;

Stephen Edwards - Counts 21 and 22; and

Edwin Edwards - Counts 21 and 22.

Despite the objection of the United States, the Court also granted a new trial on the following counts:

Stephen Edwards - Counts 20, 25, 26 and 27; and

Edwin Edwards - Counts 20, 25, 26 and 27.

In all other respects, the Court, for oral reasons given and in accordance with Griffin v. United States,[5] denied the defendants' motions for a new trial on all other counts based on Cleveland.[6] In doing so, the Court held that the defendants were not entitled to a new trial on all counts because of an alleged "spillover effect" from the mail and wire fraud counts on which the Court granted a new trial.[7]

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[5]502 U.S. 46, 112 S. Ct. 466, 116 L.Ed.2d 371 (1991).

[6]The Court adopts, as part of this opinion, the oral reasons previously given which granted in part and denied in part new trials based on Cleveland. See Rec. Doc. No. 1696 (Tr. 12/6/00); Rec. Doc. No. 1697 (Tr. 12/7/00).

[7]In the alternative, the Court also found there was harmless error. See Neder v. United States, 527 U.S. 1, 119 S. Ct. 1827, 144 L.Ed.2d 35 (1999).

The Court must now resolve the other issues raised in the defendants' pending motions. For the reasons set forth below, the defendants' motion for judgment of acquittal, post-verdict judgment of acquittal, or new trial, is DENIED.

I. Arguments Presented

In addition to the claims asserted under Cleveland, the defendants contend they are entitled to a judgment of acquittal, or alternatively a new trial, because the Court:

(1) improperly dismissed Juror #68 during jury deliberations;

(2) failed to suppress illegally obtained electronic surveillance evidence and the fruits thereof;[8]

(3) failed to suppress fruits of an illegal search;

(4) empaneled an anonymous jury in contravention of defendants' constitutional rights;

(5) improperly tried Bobby Johnson in absentia and, in so doing, created delays that prejudiced all of the defendants;

(6) failed to grant Bobby Johnson's motion for a mistrial; and

(7) erroneously denied defendants' motions to sever their cases from Bobby Johnson.

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[8]See Appendix A. Since the motion for a new trial was filed, the defendants have filed a motion to reconsider the Court's denial of these motions. See Rec. Doc. No. 1660.

The defendants further contend that:

(1) Edwin and Stephen Edwards' convictions for extortion, conspiracy and mail or wire fraud[9] based on the 15th Riverboat and Treasure Chest Schemes, were against the weight of evidence;

(2) there were inconsistent verdicts on the conspiracy and mail/wire fraud counts related to the 15th Riverboat Scheme;

(3) the government failed prove the essential element of concealment in the money laundering count;

(4) defendants were deprived of a public trial;

(5) defendants' counsel were denied the right of access to various proceedings at critical stages of the trial;

(6) the Court admitted improper and prejudicial hearsay evidence during the trial;

(7) the Court allowed prejudicial evidence of privileged communications between defendant, Cecil Brown, and his attorney to be admitted into evidence;

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[9]The Court has already granted Edwin and Stephen Edwards a new trial on Counts 20, 21, 22, 25, 26 and 27, which charged them with conspiracy to commit mail and wire fraud and mail or wire fraud based on Cleveland v. United States. The Court also granted Bobby Johnson a new trial on Count 6 on the same ground. See pp. 2-3, supra.

(8) Cecil Brown's conviction was against the weight of the evidence;

(9) Bobby Johnson's conviction was against the weight of the evidence; and

(10) all convictions of each defendant were against the weight of the evidence.

Finally, the defendants argue that this Court should have recused itself from further proceedings in this case after the Judge recused himself in the case of Unites States v. James H. Brown.[10]

The United States strongly opposes the defendants' motion. The government contends that the defendants' arguments are not supported by the law and evidence in this case. In addition, the United States claims the evidence in this case fully supports the guilty verdicts returned by the jury. In short, the government's position is that the defendants received a fair and impartial trial, the Court did not err in its rulings and the guilty verdicts were proper. Therefore, the government urges the Court to deny the defendants' motions for a new trial and their request for a judgment of acquittal.

The Court now turns to a discussion of each of these contentions.

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[10]CR No. 99-151. See Rec. Doc. No. 1489.

II. Discussion

Dismissal of Juror #68 :[11]

During the jury's deliberations, the Court received two notes from the jury which ultimately caused the Court to conduct a hearing. One note came from Juror #68. The foreman of the jury sent the other note on behalf of the jury. In addition to conducting a hearing on the two juror notes, the Court also conducted a hearing, at the same time, on a prior complaint the Court had received from two citizens regarding Juror #68.[12]

The defendants argue that the Court improperly investigated the allegations surrounding Juror #68 and then removed the juror, in violation of the defendants' constitutional rights. According to the defendants, the Court should not have investigated the complaints it received about this juror from a telephone call made to the Court during the trial or the information set forth in the foreman's note which indicated that the juror may have been disobeying the Court's instructions.[13] In opposition, the government argues that Juror #68 was improperly removed as a juror based on his lack of candor with the Court

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[11]As the record reveals, the Court used an anonymous jury. Therefore, jurors were referred to by the number assigned to them.

[12]The hearing that the Court held on Juror #68 was identical to the hearings previously conducted on Juror #350, after the Court had received a similar complaint. The defendants did not object to the investigation or to the dismissal of Juror #350, even though the Court's reasons for dismissing the jurors were essentially identical.

[13]Rec. Doc. No. 1475, pp. 3-10.

and his failure to follow the Court's instructions.[14]

Because the Court again finds that Juror #68 was properly removed as a juror, the Court denies the defendants' motion for a judgment of acquittal, or new trial, based on this ground. The Court has previously set forth detailed reasons, in two separate opinions, explaining why Juror #68 was removed from the jury.[15] The Court adopts by reference the reasons set forth in these opinions. As reflected in these opinions, the Court found that the juror had not been candid with the Court in the responses he gave during a hearing conducted by the Court. The Court also found that on several occasions, including during jury deliberations, the juror had failed to follow the legal and other instructions given to the jury by the Court. As is clearly noted in the transcripts of the hearings conducted by the Court and in the Court's earlier opinions, the Court did not remove this juror for his religious beliefs or for any opinions he may have had regarding the guilt or innocence of any defendant. The Court also found that the complaints made by the two citizens did not warrant Juror #68's dismissal.

Fifth Circuit jurisprudence clearly holds that a trial court has discretion to remove a juror who fails to be candid in

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[14]Rec. Doc. No. 1496, pp. 2-10.

[15]The Court dictated two lengthy opinions into the record after Juror #68 was discharged from the jury. See Rec. Doc. No. 1611, pp. 24-31; 32-51 (Tr. 5/5/00). The Court first announced one opinion in an open hearing, with the press and public present. To avoid any prejudice to the remaining jurors who were still deliberating, the Court provided a more detailed explanation to the parties and their counsel in an in camera hearing. Both of these opinions have now been made a part of the public record.

answers given to the Court.[16] In addition, a district court is bound to investigate allegations and remove a juror who has violated his or her oath as a juror by disobeying the court's instructions.[17]

In addition to the reasons previously given by the Court, the Court now addresses the arguments specifically raised by the defendants in their motion. The Court believes that it is important to set forth a clear timeline of the events which ultimately led to the removal of Juror #68. Despite the Court's clear statement and ruling that the Court only removed Juror #68 because of his lack of candor and his failure to follow the court's instructions, the defendants attempt to characterize the Court's investigation of Juror #68 as an improper intrusion into the jury's deliberative process. The Court finds that the hearings which led to the removal of this juror did not involve an improper inquiry into the jury's deliberations for a number of reasons. It is clear that the removal was not based on the juror's beliefs about the sufficiency, or insufficiency, of the evidence. In addition, the record clearly reveals that the Court was very careful not to ask questions about any juror's opinion on the guilt or innocence of the defendants, or matters discussed by the jury during its deliberations.[18] It was only after the Court began to conduct its

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[16]See United States v. Fryar, 867 F.2d 850 (5th Cir. 1989).

[17]United States v. Thomas, 116 F.3d 606 (2nd Cir. 1997), petition for cert. filed (Mar. 24, 2000) (No. 99-8779).

[18]Rec. Doc. No. 1603, pp. 287-289, 295-296, 305 (Sealed Tr. 5/1/00); Rec. Doc. 1604, pp. 287-289, 295-296, 305 (Redacted Tr. 5/1/00). See also Rec. Doc. No. 1605, pp. 5-7, 18, 23-24, 29, 52-64, 78-79, 91, 91-102, 136, 153, 161, 168-170, 175, 181, 185-188, 191 (Sealed Tr. 5/2/00); Rec. Doc. No. 1606, pp. 5-7, 18, 23-24, 29, 52-64, 78-79, 91, 91-102, 136, 153, 161, 168-170, 175, 181, 185-188, 191 (Redacted Tr. 5/2/00).

investigation on the foreman's note, that the Court learned of instances of the juror's failure to follow the Court's instructions and his subsequent failure to be candid with the Court about these issues.

In addition to the foreman's note, the Court had also received other information, during the trial, regarding alleged actions of Juror #68. During the course of the trial, the Court received several anonymous phone calls from persons who claimed to have information regarding Juror #68. Essentially, the callers alleged that Juror #68: (1) was talking about the case at church functions while serving as a juror in this case; (2) had previously been involved with defendant, Edwin Edwards, in a medical transportation business in Melville, Louisiana; (3) had sought counseling from his pastor about the verdict; and (4) had strong bias against the defendant, Edwin Edwards. After questioning Juror #68 on two separate occasions regarding these allegations,[19] the Court found no reason at that time, based on the evidence presented, to remove him from the jury. Without objection from the defendants, the Court allowed Juror #68 to remain on the jury.

Because the Court was able to identify the two people who called the Court in reference to Juror #68, the Court had the United States Marshal's Office investigate the matter further. The United States Marshal's Office proceeded to interview those persons who had information regarding the allegations made pertaining to Juror #68. As the Court received information about the matter from the marshal's office, the Court disclosed the information to the parties. At various times before the jury began its deliberations, the Court advised the parties of the need to hold a hearing on these allegations. The Court believed then, and continues to believe, that because of Juror #68's alleged bias

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[19]See Rec. Doc. No. 1587, pp. 48-50 (Tr. 3/21/00); Rec. Doc. No. 1695, pp. 10-11 (Tr. 4/18/00).

against Edwin Edwards and the other allegations made regarding Juror #68, the Court was required to hold a hearing on whether Juror #68 should continue to serve as a juror. Once the Court received the foreman's note, it was clear that a hearing on the previous allegations received by the Court and those raised by the foreman's note should be held at the same time.

Other information also came to the Court's attention, during the trial, regarding Juror #68. After jury deliberations began on April 24, 2000, the court discovered that a juror had brought a dictionary and a thesaurus into the jury deliberation room. The court directed the United States Marshal's Office to remove the two books. The Court also admonished the jury that they were not to consider any outside sources, like the dictionary, as part of their deliberations. The Court advised the jury that they had to follow the law, as provided by the Court. In addition, the Court instructed the jury that no juror could bring anything into or take anything from the jury deliberation room without the permission of the Court. The Court stated:

> Under no circumstances may you bring other materials in the jury room other than what I sent back there to you. That means your notes that you have already taken during the trial, the notes that you take during the course of your deliberations are permitted.
>
> The indictment that the Court sent back to you may be used by you. The jury charge which I sent to you may be used by you. All of the exhibits which have been sent to the jury deliberation room may be used by you. Nothing that was not admitted into evidence or given to you by the Court can be used by you, and nothing else can be brought into the jury room.

Dictionaries, thesauruses are not permitted.[20]

The Court later discovered that Juror #68 had brought the dictionary and the thesaurus into the jury deliberation room without the permission of the Court, and that the dictionary may have been referred to during the deliberations. Among the words highlighted, or otherwise marked, in the dictionary were "conspiracy," "extortion" and "extort."[21]

This was not the first time Juror #68 had failed to follow the Court's instructions to the jury. During the trial, despite being specifically instructed not to do so, Juror #68 had kept a copy of a transcript of a telephone call, which had been played to the jury. The Court allowed the jurors to use the transcripts as an aid when the recordings were played to the jury. The jurors were not permitted to keep copies of the transcripts. The Court only discovered that Juror #68 had kept a copy of the transcript when the transcript fell from his trial notes when the notes were being secured at the end of the day's testimony. The Court had also instructed the jurors not to write any notes or other matters, including their juror numbers, in the transcript books which the jury was using. However, when the defendant, Edwin Edwards, was testifying during the trial, he noted that Juror #68's number was on the transcript book that he was using during his testimony.[22] The Court requested that Edwin Edwards be given another transcript books to use during his testimony.

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[20]Rec. Doc. No. 1687, p. 41 (Tr. 4/25/00).

[21]The jury foreman and other jurors revealed that certain definitions from the dictionary were discussed by the jurors. The definitions of "extortion," "extort" and "conspiracy"

[22]This document, with Juror #68's number on it, was introduced into evidence. See Rec. Doc. No. 1460.

Several days after the dictionary incident, the Court received a note from Juror #68 which indicated that he felt "intimidated" by other jurors and had "doubts."[23] The note did not provide any other details regarding the source of the juror's problems. After sending the note to the Court, the juror refused to re-enter the jury deliberation room, apparently waiting for the Court to respond to his note. Instead of individually questioning the jurors about this incident, the Court decided to re-read a portion of the final jury charge which had earlier been given to the jury after closing arguments.[24] The jury then resumed its deliberations.

On May 1, 2000, the Court received a note from the jury foreman regarding a jury problem.[25] After extensive discussions with the parties regarding the proper procedure the Court should follow, the Court elected to question only the jury foreman to determine the nature of the problem. The Court decided to question the jury foreman for two primary reasons: (1) the Court simply did not have adequate information based on the two jury notes to determine what problems, if any, the jury was having; and (2) based on the facts and the circumstances, the Court concluded the refusal to deliberate could be related to the "intimidation" mentioned by Juror #68 in his note to the Court, the dictionary incident, or other matters of which the Court was not aware.[26] Because the Court was also aware of the sensitive

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[23]Rec. Doc. No. 1316 (Jury Note No. 7) (4/27/00).

[24]The Court read the section of the jury charge which explained a juror's duty to deliberate.

[25]Rec. Doc. No. 1328 (Jury Note No. 11) (5/1/00).

[26]The defendants strenuously argued that the Court had adequate information based only on the two notes to conclude that the juror's refusal to deliberate was based on the sufficiency of the evidence. Rec. Doc. No. 1475, p. 6. As the testimony

nature of questioning jurors during deliberations, the Court informed the parties that a limited scope of questions would be posed. The Court also discussed the procedures which would be followed by the Court.[27] The following procedure was adopted: The Court first discussed what questions would be asked of the juror with the parties. The Court then brought the juror into the conference room and asked the juror those questions, on the record, with only the juror, Judge, marshal and court reporter present. After answering the Court's questions, the juror was excused from the room and the Court discussed the answers and follow-up questions with the parties. During the interview with the foreman, the Court clearly set forth the parameters of the questions to be asked of him by telling the foreman, before any questions were asked:

> **THE COURT**: Mr. 64, the only people here, as you can see, is the court reporter and myself and the marshal. I am going to ask you some very limited questions in an attempt to have you explain the last note that you all sent to me, number 11, regarding the note that I am not showing you. Okay.
>
> **Never do I want you to tell me, nor do I want to know, how you have voted or anybody else on that jury has voted, including the juror who is subject of the note.** Do you

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later revealed, the notes failed to adequately explain the problems which the jurors were encountering, as well as the fact that material was being taken to and from the jury deliberation room by Juror #68.

[27]Rec. Doc. No. 1603, pp. 263-283 (Sealed Tr. 5/1/00); Rec. Doc. No. 1604, pp. 263-283 (Redacted Tr. 5/1/00).

understand that? You have to answer me.[28]

Each time the Court questioned this juror (and all other members of the jury), the court cautioned the juror note to disclose any information about the deliberative process, their votes or their discussion of the evidence.

During his testimony, the foreman explained that Juror #68 refused to discuss anything with the other jurors during the deliberations and that "[h]e doesn't interject at all to help us understand why this person feels the way he does on an issue versus why we feel this way on the issue to help us understand his way or for him, for us to help him understand our way."[29] As a part of a follow-up question and answer, the foreman also disclosed that he observed Juror #68 removing pieces of paper from the jury room during the course of deliberations. In pertinent part, the foreman said:

> **JUROR 64**: Not a threat, it was just more of an attitude between - I am not going to talk - I am not talking to that person. Jurors have seen several things going on that look funny. Showing up possibly with some notes that came from your house. I believe two or three people noticed that. I don't have enough -
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> **THE COURT**: This juror may have brought something in?

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[28]Rec. Doc. No. 1603, p. 269 (Sealed Tr. 5/1/00); Rec. Doc. No. 1604, p. 269 (Redacted Tr. 5/1/00) (emphasis added).

[29]Rec. Doc. No. 1603, p. 280 (Sealed Tr. 5/1/00); Rec. Doc. No. 1604, p. 280 (Redacted Tr. 5/1/00).

JUROR 64: A note from home. I couldn't swear under oath that I know for a fact that happened. I saw part of that situation and I believe it happened.

I saw along with four or five other jurors today this person take several notes out of the personal notebook, walk out of the room to the bathroom, and come back in and make a point that we saw him lay one sheet of paper back on tap of his book. I know he walked out of the room with more than one sheet of paper. It may be all innocent. I don't know, but the way the voting is going and the kind of comments that have been made, and the lack of communication in deliberation, all of these little things have caused a lot of concerns in the room.

THE COURT: We are not going to ask you any more questions tonight. We are going to let you go home, and we will meet again at eight o'clock in the morning.[30]

The foreman's statements about Juror #68 removing paper from the jury deliberation room concerned the Court. Because of dictionary and thesaurus incident and the Court's firm instructions to the jury that no material should be brought into or taken from the jury room, the Court was concerned that this juror was again disobeying the Court's instructions. The Court has already explained other instances where Juror #68 had failed to follow the Court's instructions. The Court believed it was imperative to determine what was happening to ensure that the jury deliberations and any verdict would not be questioned later, particularly if guilty verdicts were returned.

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[30]Rec. Doc. No. 1603, pp. 292-293 (Sealed Tr. 5/1/00); Rec. Doc. No. 1604, pp. 292-293 (Redacted Tr. 5/1/00).

On the following day, the Court again questioned the foreman regarding his note.[31] The foreman's answers were consistent with his previous day's testimony, although he also stated the following regarding Juror #68:

> The book that we have, the binder, with all of the yellow paper that we write in throughout the trial, and it could be just coincidence, but during a part that was kind of not going well in deliberations, because of a certain individual, when we got – after the vote was made, I believe it was after the vote was made, several pages were taken out, and then he went to the bathroom. He was gone three to five minutes. And when he came back there was only one yellow sheet of paper.[32]

The Court then questioned Juror #68 regarding the dictionary and thesaurus incident, and the bringing of material into and the removal of notes from the jury room.[33] Although Juror #68 acknowledged bringing the dictionary and thesaurus into the deliberation room, he denied bringing anything else into the room. The transcript reflects that the Court very specifically asked this juror about the issues testified to by the foreman:

> **THE COURT**: Okay. I am going to ask you a couple more questions.

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[31]Rec. Doc. No. 1605, pp. 103-108 (Sealed Tr. 5/2/00); Rec. Doc. No. 1606, pp. 103-108 (Redacted Tr. 5/2/00).

[32]Rec. Doc. No. 1605, pp. 106-107 (Sealed Tr. 5/2/00); Rec. Doc. No. 1606, pp. 106-107 (Redacted Tr. 5/2/00).

[33]Rec. Doc. No. 1605, pp. 154-168 (Sealed Tr. 5/2/00); Rec. Doc. No. 1606, pp. 154-168 (Redacted Tr. 5/2/00).

JUROR #68: Yes, sir.

THE COURT: And then we will probably take another little break, okay?

JUROR #68: Yes, sir.

THE COURT: What materials, including the dictionary and thesaurus, have you brought into the jury room; could you describe each of them with some particularity as to what you have brought into the jury room?

JUROR #68: Yes, sir. I apologize for bringing that. The night before the second day of deliberation, my son had some books out, and one of them was his dictionary. I was just glancing through it, and I asked him if I could use it. And I was not aware that you couldn't have one, and I innocently did bring it into the jury room. Well, my son asked me, he said, well, here is another book. You might want it too, you know. And I didn't even really notice what it was until I got here, and I saw it was a thesaurus, too. So I just put them on the table, deliberation table. And before it was discovered, another juror had asked, do we have a dictionary in here? And I said, sure. I said, I brought one, I said, in case we needed it. And that person said, great, you know. That will help us to maybe understand some things better as we go along. I said, well, you're more than welcome to use it.

So there were a couple of words that were looked up. And to make it easier, I was going to highlight each word and put a sticker, the stickum paper on each word, in case we wanted to go back to it. We just had to thumb to see on the

end of the card what the word was. But it was seen before, right after lunch.

* * *

THE COURT: Okay. Were any other materials brought into the jury room?

JUROR #68: By me?

THE COURT: Yes.

JUROR #68: **No, sir. Nothing else.**

THE COURT: Specifically, do you know if you ever brought any notes into the jury room that were not your notes that you all kept up here? Did you bring any other notes into the jury room from home or any other place?

JUROR #68: Notes that I made or anything?

THE COURT: I am just asking. I don't –

JUROR #68: No, sir.

THE COURT: Any other material of any kind, whether they were note, papers, books, charts, whatever, whatever you might want to – I mean, you have to tell me, I don't know.

JUROR #68: That's all that I brought in, your Honor.

THE COURT: Just the dictionary, and just the thesaurus?

JUROR #68: Yes, sir. Yes, sir.

* * *

THE COURT: Okay. Have you – well, let me phrase it this way – what materials of any type whatsoever have you taken from the jury room and just brought home with you, or just taken outside of the jury room?

JUROR #68: Besides – and this really isn't material – besides water, or a could drink, I have a medicine, a bag with medicine in it. That's all.[34]

The following day, the Court again questioned Juror #68 regarding the removal of notes from the jury room.[35] Juror #68 again denied removing any notes from the jury room. He then admitted he may have taken blank pages from his notebook and written down his wife and son's names on the paper to calm his nerves.[36] After several more questions, the juror also recalled

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[34]Rec. Doc. No. 1605, pp. 161-166 (Sealed Tr. 5/2/00); Rec. Doc. No. 1606, pp. 161-166 (Redacted Tr. 5/2/00) (emphasis added).

[35]Rec. Doc. No. 1607, pp. 41-46 (Sealed Tr. 5/3/00); Rec. Doc. No. 1608, pp. 41-46 (Redacted Tr. 5/3/00).

[36]Rec. Doc. No. 1607, p. 42 (Sealed Tr. 5/3/00); Rec. Doc. No. 1608, p. 42 (Redacted Tr. 5/3/00).

that he may have brought extraneous materials into the room.[37] The Court then questioned the remaining jurors. Juror #68's account of taking things into and out of the jury room was contradicted by several of the other jurors. Jurors 335, 334, 36, 11, and 134 all stated that they saw Juror #68 remove papers from the jury room.[38] Juror #334 clearly saw the incident. She testified "just yesterday after the note was sent, he – when we came back upstairs, he [Juror #68] tore out about five or six pages from his notebook that it appeared he had been writing on throughout that – just that day, just yesterday, and went to the bathroom with them, and when he came back he had only one sheet. And I noticed this because he's right on the side of me."[39] Jurors 235 and 160 also saw Juror #68 either remove the papers from the jury room or bring them back in.[40] The Court reached the following factual conclusions regarding the events

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[37]Rec. Doc. No. 1607, pp. 41-45 (Sealed Tr. 5/3/00); Rec. Doc. No. 1608, pp. 41-45 (Redacted Tr. 5/3/00). In referring to his recollection that he brought paper into the jury room, Juror #68 said [he brought in] "a question one time at the beginning that I on the way to where they pick us up at I had jotted down on a piece of paper. Other than that – and I just glanced over it in the deliberation room." Rec. Doc. No. 1607, p. 43 (Sealed Tr. 5/3/00); Rec. Doc. No. 1608, p. 43 (Redacted Tr. 5/3/00).

[38]See Rec. Doc. No. 1605, pp. 213; 235-237; 243-246; 251-252; 258-263 (Sealed Tr. 5/2/00); Rec. Doc. No. 1606, pp. 213; 235-237; 243-246; 251-252; 258-263 (Redacted Tr. 5/2/00).

[39]Rec. Doc. No. 1605, p. 235 (Sealed Tr. 5/2/00); Rec. Doc. No. 1606, p. 235 (Redacted Tr. 5/2/00).

[40]See Rec. Doc. No. 1605, pp. 198-200; 228-230 (Sealed Tr. 5/2/00); Rec. Doc. No. 1606, pp. 198-200; 228-230 (Redacted Tr. 5/2/00).

surrounding Juror #68:[41]

(1) Juror #68 brought materials into and removed material from the jury room. He did so in direct violation of the Court's previous order which prohibited the jurors from bringing any extrinsic information into the jury deliberation room or from removing materials from the jury deliberation room.

(2) The juror denied bringing any materials into or out of the jury deliberation room when questioned by the Court. This testimony was contradicted by the testimony of numerous other jurors.

(3) Only after being confronted with questions about the extraneous materials did the juror remember that he had taken materials out and brought materials into the jury room.

(4) The testimony of other jurors directly conflicted with Juror #68's testimony on these issues.

The Court, based on the information presented at the hearing and considering other matters which had occurred during the trial involving Juror #68, removed Juror #68 from the jury for just cause.

Fed. R. Civ. Proc. 23(b) allows a verdict to be rendered by a jury of less than twelve if "the court finds it necessary to excuse a juror for just cause after the jury has retired to consider

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[41]In reaching these factual conclusions, the Court took into consideration the credibility of the witnesses who testified at the hearing.

its verdict." The jurisprudence has defined what constitutes "just cause" for the removal of a juror once deliberations have begun.[42]

As the Court noted in its oral opinions, it would be "a dereliction of duty for a judge to remain indifferent to reports that a juror is intent on violating his oath."[43] It is clear that a juror who "is determined to ignore his duty, who refuses to follow the court's instructions on the law and who threatens to 'undermine the impartial determination of justice based on law' is subject to dismissal during the course of deliberations under Rule 23(b)."[44] "This conclusion reinforces the court's inherent authority to conduct inquiries in response to reports of improper juror conduct and to determine whether a juror is unwilling to carry out his duties faithfully and impartially."[45] The Court may remove a juror for failure to follow the Court's instructions and for failure to be candid with the Court. The Court may not discharge the juror "if the record evidence discloses any possibility that the request to discharge stems from the juror's view of the sufficiency of the government's evidence . . . ."[46]

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[42]See United States v. Brown, 823 F.2d 591 (D.C. Dir. 1987); United States v. Thomas, 116 F.3d 606 (2nd Cir. 1997), petition for cert. filed (Mar. 24, 2000) (No. 99-8779).

[43]Rec. Doc. No. 1611, p. 26 (Tr. 5/5/00). See also Thomas, 116 F.3d at 616.

[44]Thomas, 116 F.3d at 617 (quoting United States v. Krzyske, 836 F.2d 1013, 1020 (6th Cir.), cert. denied, 488 U.S. 832, 109 S. Ct. 89, 102 L.Ed.2d 65 (1988)).

[45]Id.

[46]Brown, 823 F.2d at 596. See also Thomas, 116 F.3d at 621, 622.

A review of the record in this case reveals that the court was very careful not to probe into the jurors' opinions as to the sufficiency of the evidence, or to otherwise learn any juror's views regarding the evidence or the substance of their deliberations. Indeed, the Court gave a very careful instruction to each juror before asking the juror any questions which cautioned the juror not to disclose their vote, or the vote of any juror, juror discussions of the evidence, or information about the deliberative process.[47] As the Court noted earlier, once the juror advised the Court of the nature of the problem, the Court only asked questions about extraneous matters.[48]

After questioning the jury foreman about the remaining allegations in his note, the Court felt obligated and compelled to resolve the other allegations which had been brought to the Court's attention by the foreman. It was during these interviews that the Court discovered that Juror #68 had violated the Court's instructions prohibiting jurors from bringing in or taking materials from the jury deliberation room and that Juror #68 had not been candid with the Court. In deciding to remove Juror #68 from the jury, the Court found that he had previously violated the Court's orders by:

(1) keeping a copy of a transcript, on which he placed his juror number, of a tape recording which had been played to the jury with his trial

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[47]The Court advised the parties that it could no longer ask Juror #68 additional questions because of the Court's belief that there was a possibility that Juror #68's position may be based on his evaluation of the evidence.

[48]These extraneous matters were commonly referred to as questions one, two, three and five. See Rec. Doc. No. 1605, p. 191 (Sealed Tr. 5/2/00); Rec. Doc. No. 1606, p. 191 (Redacted Tr. 5/2/00).

notes;

(2) writing his juror number on the transcript book which Edwin Edwards later used briefly during his testimony;

(3) bringing a thesaurus and a dictionary into the jury room and highlighting definitions of "conspiracy," "extort" and "extortion" found in the dictionary;[49]

(4) taking papers in and removing papers from the jury room during the jury's deliberations after having been instructed not to do so by the Court; and

(5) failing to be candid with the Court when the Court asked the juror questions regarding materials being taken to or from the jury deliberations room.

The cumulative effect of the juror's failure to follow the Court's instructions and to be candid with the Court constituted "just cause" to remove the juror from the jury. His removal had nothing to do with his opinion of the evidence or his religious beliefs. The Court also found that the complaints made by the two citizens during the trial did not warrant the juror's removal. For the Court to have allowed the juror to continue to serve in this case would not have been in the interest of justice and would have "threatened to undermine the impartial administration of

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[49]Juror #68 violated the Court's instructions on extraneous material only several days after it was given to the jury. Despite the defendant's attempts to portray the juror's actions as understandable and innocent, the Court's instructions were very clear. No material was to be brought into or taken out of the jury room.

justice based on law."[50]

The defendants' argument that Juror #68 was the lone hold out whose removal deprived the defendants of their right to a unanimous verdict is not supported by the facts of this case. This jury returned numerous not guilty verdicts in this case and also found that numerous racketeering acts had not been proven. The verdict fails to support the argument that the jury wanted the juror off the jury in order to be able to return guilty verdicts. Furthermore, the mere fact that a juror may be a hold out, which is not certain here, does not preclude the Court from removing the juror for just cause.[51] A review of the record also reveals that the Court heeded the cautions set forth in Thomas and other appellate cases in conducting its hearings. Specifically, the Court was very careful to maintain jury secrecy during the investigation in order to safeguard jury deliberations. Following the hearing, detailed instructions were given to the jury and voir dire was conducted to make sure the remaining jurors could serve in a fair, honest and impartial manner. Thus, a careful balance was maintained and the integrity of the jury was not compromised.

The investigations did not interfere with the defendants' right to a trial by jury. The Court was careful to follow circuit precedent when conducting its hearings. It also followed circuit precedent in removing all of the jurors who were removed in this

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[50]United States v. Krzyske, 836 F.2d 1013, 1020 (6th Cir.), cert. denied, 488 U.S. 832, 109 S. Ct. 89, 102 L.Ed.2d 65 (1988).

[51]United States v. Huntress, 956 F.2d 1309 (5th Cir. 1992), cert. denied, 508 U.S. 905, 113 S. Ct. 2330, 124 L.Ed.2d 243 (1993); United States v. Leahy, 82 F.3d 624 (5th Cir. 1996).

case. As the jurisprudence indicates,[52] when extrinsic material is introduced into the jury deliberation room, the sanctity of jury deliberations is invaded and the Court must ensure that such material does not influence the jury's verdict.

As noted earlier, the Court took into consideration the credibility of the witnesses in reaching its decision. In determining the facts, the Court stated:

> Despite Mr. 68's denial of his, that he brought notes out of the room or brought notes back into the room on the first inquiry that the court conducted, Jurors 160, 334, 36, 134, 370 and 237 saw the juror take notes, leave the room, the jury deliberation room, and come back with the notes. Three jurors did not see the notes go out, but saw the notes come back in, Jurors 11, 64 and 235. Two jurors did not see anything in regard to this matter, Jurors 335 and 300, although Juror 335 testified that that juror was troubled by what had happened after she learned of it.
>
> Four jurors saw notes come out of the juror's, #68's pocket, Jurors 160; 36; 334 - who apparently was sitting close to him at the time - and 64.
>
> Two of the jurors, numbers 36 and 334, testified that these notes would be pulled out at the time of votes, and Juror 36 indicated that the juror was very suspicious.
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> Juror 334 indicated that she believed this was done on more than one occasion, but she

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[52]See Paz v. United States, 462 F.2d 740 (5th Cir. 1972), cert. denied, 414 U.S. 820, 94 S. Ct. 115, 38 L.Ed.2d 52 (1973); United States v. Luffred, 911 F.2d 1011 (5th Cir. 1990).

would only testify that shw saw it at least once.[53]

The defendants also argue that the Court treated Juror #68 differently from Juror #350. However, the record reveals that Juror #350 was also removed from the jury for failing to be candid with the Court. The Court followed the same procedures in conducting the hearings involving both of these jurors. What complicated the hearing involving Juror #350 was the fact that persons who were closely associated with the defendants had made the accusations against the juror. However, these close associations were not voluntarily disclosed to the Court by the defendants or their counsel. One of the key witnesses at the hearing involving Juror #350 had previously dated Vickie Edwards, the daughter and sister of Edwin and Stephen Edwards, respectively, had eaten frequently at the governor's mansion, and rode horses with Edwin Edwards. He also was a business partner of Bobby Johnson and was Bobby Johnson's wife beautician, and who may have even fixed her hair during the trial. Another witness had attended the wedding of Candy Edwards' best friend, which was held at the governor's mansion. After holding appropriate hearings regarding Juror #350, the Court excused the juror, whom the defendants believed to be pro-government. While the defendants argue that Juror #68 may have been a pro-defense juror, it is immaterial to the Court which side a party thinks a juror may favor. The Court's main concern is whether a juror is fair and impartial, and is complying with the Court's instructions in reaching his or her verdict and serving as a juror in the case. Both Juror #350 and Juror #68 were removed for just cause. Therefore, the Court finds that the defendants' motion for a new trial based on the removal of Juror #68 is DENIED.

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[53]Rec. Doc. No. 1611, p. 39 (Tr. 5/5/00).

Fruits of Electronic Surveillance and Search Warrants

Prior to the trial, the defendants filed motions to suppress evidence obtained from the electronic surveillance and from search warrants authorized by Judges Donald Walter and John Parker. The Court denied the motions, for written reasons assigned.[54] After the motion for a judgment of acquittal, or new trial, was filed, the defendants filed a Motion to Reconsider Denial of Suppression Motions and Supplemental Filing in Support of its Motion for New Trial on Grounds of Failure t Suppress Fruits of Illegal Electronic Surveillance and Illegal Searches.[55] In addition, the defendants adopt, by reference, a similar motion filed by the defendant Cecil Brown in United States v. Cecil Brown.[56] The government has filed a reply to the government's response to their motion.[57] The defendants have also filed a reply to the government's response to their motion.[58] A summary of the arguments of the parties is necessary to properly understand the issues before the Court on this motion.

Cecil Brown filed a Motion to Suppress the Fruits of the Wire, Oral and Electronic Surveillance and the Fruits of the Search Warrants on November 17, 2000 in CR No. 99-171. In addition to adopting the prior motions filed in CR No. 98-165, Brown made additional arguments based on information obtained from depositions and other court hearing which occurred in unrelated cases in Texas.

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[54]Rec. Doc. No. 1539. See Appendix A.

[55]Rec. Doc. No. 1660.

[56]CR No. 99-171. See Rec. Doc. No. 32.

[57]Rec. Doc. No. 1674.

[58]Rec. Doc. No. 1680.

As noted in the Court's earlier opinion which is attached to the appendix of this opinion, the FBI filed an application and order in the Western District of Louisiana seeking to place a wiretap on the home and office phones of Cecil Brown. Attached to this initial application was the affidavit of FBI Agent Freddie Cleveland. Brown and the other defendants contend "that the Cleveland affidavit either deliberately or with reckless disregard for the truth omitted facts clearly critical and material to a finding of probable cause."[59] The defendants further argue that "the Cleveland affidavit failed to relate or misstated critical information concerning Patrick Graham's past and current criminal activity and his lack of credibility for the reviewing judge to consider in determining whether to issue the requested wiretaps."[60] Specifically, Brown and the other defendants contend that the affidavit fails to:

(1) "Specify the nature or extent of Patrick Graham's extensive criminal and fraudulent activity. . .;"[61]

(2) Inform "that the FBI created a 'Chinese wall' whereby they purposefully did not learn of the specifics of Graham's criminal activity in Texas" or "the specifics of the substantial civil judgment against Graham for fraud in Texas;"[62] and

(3) "Set forth the substantial motivation Patrick Graham had to lie based upon the benefits he would gain from assisting the government in making a case against Cecil Brown, Edwin

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[59]CR No. 99-171, Rec. Doc. No. 33, p. 4.

[60]Id.

[61]Id. at 4.

[62]Id. at 5.

Edwards and others in Louisiana."[63]

In short, the defendants allege that the FBI purposefully remained ignorant of Patrick Graham's criminal activity and civil fraud, which directly implicated his credibility and reliability, and failed to call this to the attention of Judge Walter. The defendants further contend that the United States failed to disclose to Judge Walter that it would assist Graham in obtaining a downward departure in his federal tax case in Texas, advise the Texas state judge of his cooperation, and grant Patrick Graham and his brother, Michael, immunity from all federal crimes committed in Louisiana or committed partly in Louisiana and partly in Texas. Therefore, Brown and the other defendants argue that the ". . . Cleveland affidavit does not support a finding of probable cause to believe that a criminal offense has been (or will be) committed and that the facilities where interception will occur have or will be used in the commission of the alleged crime, such that evidence of the alleged crime will be obtained through the interception."[64]

In addition to the above allegations, the defendants have filed a separate motion in the instant case (CR 98-165) which sets forth additional reasons for the Court to grant the motion to suppress. In their motion for reconsideration, the defendants contend "that the government did not provide Judge Walter and Judge Parker with complete and accurate information when it presented affidavits to those judges for authority to conduct electronic surveillance and to search the houses and offices of the defendants."[65] Defendants suggest that the information that was provided by the government "was intentionally or recklessly

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[63]Id.

[64]Id. at 6.

[65]Rec. Doc. No. 1660, p. 1.

false in regard to key factual points."[66] In the memorandum filed to support the motion to CR No. 98-165, the defendants contend that the government failed to set forth specific details in the affidavits about the investigations being conducted by federal and state authorities and the benefits the Graham brothers were receiving. The defendants also assert that the FBI and the United States Attorney's Office for the Eastern District of Louisiana "purposefully avoided" learning anything else about the Grahams and "made a deliberate decision to withhold this information from both Judge Parker and Judge Walter."[67] The defendants contend that "[t]he government vouched for [Patrick] Graham's credibility and then withheld information it had from the courts that contradicted that credibility and purposefully avoided learning additional information that it knew would further contradict that credibility."[68] In addition, the defendants argue that "the government entered into some agreements with the Grahams that were never disclosed to Judge Walter or Judge Parker."[69] According to the defendants, the immunity agreement made with the Grahams was "in violation of Justice Department Regulations."[70]

The defendants also contend the information set forth in Cleveland's June 26, 1996 affidavit, regarding an alleged payment made to bribe Edwin Edwards, "was a lie."[71] Thus, the

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[66]Id.

[67]See Rec. Doc. No. 1661, p. 3.

[68]Id. at 4.

[69]Id. at 5.

[70]Id. The defendants make specific reference to USAM §§ 9-27.640 and 9-27.650.

[71]Id at 6.

defendants suggest that the government provided false information to the judge.

Finally, in both motions, the defendants seek a hearing under Franks v. Delaware[72] to determine what effect these disclosures or failure to disclose have on the affidavits submitted to Judges Parker and Walter.

The United States has filed a response to the defendants' motions in CR No. 98-165[73] and CR No. 99-171.[74] The United States contends that the disclosures it made in the Cleveland affidavit comply with "relevant case law."[75] The government also states that the judges:

(1) " were given **more** than enough information to determine that Pat Graham had motivation to lie;"[76]

(2) "were told that Pat Graham had been **indicted** by a Texas grand jury for money laundering and theft, said matter then pending;"[77]

(3) "were further told that Pat Graham was the **target** of a current federal tax **and** corruption investigation in Houston handled by the IRS and

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[72]438 U.S. 154, 98 S. Ct. 2674, 57 L.Ed.2d 667 (1978).

[73]Rec. Doc. Nos. 564, 1674.

[74]Rec. Doc. No. 46.

[75]Rec. Doc. No. 1674, p. 2.

[76]Id. (emphasis supplied by the government).

[77]Id. (emphasis supplied by the government).

> FBI in conjunction with the U.S. Attorney's Office."[78]

The government argues that it did set up a "Chinese wall" between the Houston investigation and the investigation being conducted by the U.S. Attorney for the Eastern District of Louisiana. However, the government states "[t]he 'Chinese wall' testified to by SSA Santini was not meant to blind the investigators in Louisiana from receiving negative information about the Grahams for the purpose of avoiding disclosure to the supervising courts."[79] "Rather, it was designed for the legitimate, standard purpose of eliminating Kastigar evidence spillover which could have been detrimental to the federal investigation in Houston and violative of the Grahams' legal right not to have their cooperation used against them."[80]

Insofar as the cash payment allegedly made to Edwin Edwards which was included in the affidavit, the government concedes that the "exact date of the transfer of the cash money to Edwin Edwards was, due to the secretive nature of the transaction, mistakenly stated by SSA Cleveland as being in November 1992."[81] However, the government argues that it "was not able to pinpoint the exact date of the cash transfer to Edwin Edwards until after the investigation went public and grand jury subpoenas could be issued."[82] The government also

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[78]Id. (emphasis supplied by the government).

[79]Rec. Doc. No. 1674, p.2, n.1.

[80]Id.

[81]Id. at 3.

[82]Id. The government contends that documentary evidence established the date of the cash transfer to Edwin Edwards to be in September, 1993.

contends that when Fred Hofheinz pled guilty, he confessed that in addition to a monthly retainer, substantial sums of money were paid to Cecil Brown.

The government denies that it violated Department of Justice guidelines in its relations with the Grahams. Finally, the government argues that "SSA Cleveland's affidavit did not put an 'imprimature on the Grahams' reliability.'"[83] According to the government, the "FBI's test of Pat Graham's credibility was the consensual tapes he made with Cecil Brown."[84] The government states that "these tapes clearly established that Cecil Brown was using the name and power of Edwin Edwards to extort money out of Pat Graham," and "Cecil Brown confirmed a prima facie case of extortion on these consensual tapes, thereby confirming Pat Graham's allegations."[85]

On August 22, 2000, the Court issued a lengthy opinion which set forth, in detail, why the Court denied the defendants' motions to suppress and refused to grant the defendants a Franks hearing. The Court again finds that the defendants have not satisfied the "substantial preliminary showing" set forth in Franks.

After reviewing the defendants' motion to reconsider the Court's denial of defendants' motions to suppress, the Court finds the motions should be denied for the reasons previously set forth in the Court's August 22, 2000 opinion. The Court specifically finds that the agents did not misrepresent the meaning or context of the affidavits to the issuing judges. To the extent there were omissions in the affidavits, the Court finds that

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[83]Rec. Doc. No. 1674, p. 5.

[84]Id.

[85]Id.

this did not affect the Court's finding of probable cause. The affidavits set forth the nature of the criminal investigations involving the Grahams. A review of the totality of the facts set forth in the affidavit also reveals that Patrick Graham's statements were independently corroborated by other credible evidence, including consensual recordings and other documentary evidence. As noted in the Court's first opinion, there was an adequate factual and good faith basis for the statements made in the affidavit at the time the affidavits were submitted to the issuing judges. The same may be said regarding the defendants' contentions surrounding Patrick Graham's credibility. There was sufficient information contained in the affidavits about Patrick Graham's past and current criminal activity and the ongoing investigations for the issuing judges to consider in determining whether to issue the warrants. The depositions and other transcripts from the Texas proceedings regarding the Texas investigations and plea agreements which the United States Attorney for the Eastern District of Louisiana may have made with the Grahams do not negate the probable cause which existed in the affidavits. The Court finds the agents did not "intentionally mislead" or trick the judges into issuing the surveillance authorizations. The Court also finds there were no material misrepresentations made by the FBI agents which would have negated a probable cause finding by the two judges who issued the electronic searches of defendants' homes and offices. The Court's decision would not change even if the challenged statements were corrected or if more information on the Grahams was included. There was sufficient information set forth in the affidavits regarding the Grahams, as well as substantial independent corroboration of the information from other reliable sources, including statements made by Cecil Brown on the consensual recordings.

It is clear that an order authorizing a wiretap, like an ordinary search warrant, must be supported by a finding of probable cause. Probable cause is evaluated utilizing a totality of the circumstances test. In Illinois v. Gates, the United States

Supreme Court set forth the standard under which a Court is to review a judge's determination of probable cause as follows:

> . . . [W]e have repeatedly said that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review. A magistrate's "determination of probable cause should be paid great deference by reviewing courts." "A grudging or negative attitude by reviewing courts toward warrants[]" is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant "courts should not invalidate . . . warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than a commonsense, manner."[86]

Looking at the totality of the circumstances and giving due deference to Judge Walter's and Judge Parker's evaluation of the evidence,[87] the Court finds that Judges Parker and Walter did not act in an arbitrary manner when they issued the wiretap order and search warrants in this case.

In summary, the Court finds: (1) no Franks hearing is required because the defendants have failed to make the requisite showing; (2) Judges Parker and Walter properly found probable cause to issue the wiretap order and search warrants under the

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[86]462 U.S. 213, 236, 103 S. Ct. 2317, 2331, 76 L.Ed2d 527 (1983).

[87]A judge's decision to issue a warrant based on his determination that probable cause exists is entitled to great deference. See United States v. Phillips, 727 F.2d 392 (5th Cir. 1984); United States v. Freeman, 685 F.2d 942 (5th Cir. 1982); Doescher v. Estelle, 666 F.2d 285 (5th Cir. 1982).

totality of the facts; (3) the government did not intentionally mislead or trick the issuing judges into issuing their orders; (4) sufficient information was provided to the issuing judges about the credibility of the Grahams; (5) there was credible independent corroboration of Pat Graham's statements; and (6) all of the statutory and constitutional requirements to issue a wiretap order and search warrants were complied with.

Therefore, the defendants' motion to reconsider the denial of suppression motions is DENIED.[88]

Anonymous Jury

The defendants again object to the Court's order which granted the government's motion for an anonymous jury. The defendants have not raised any new issues in their motion for judgment of acquittal, or new trial. Therefore, the Court adopts the reasons previously set forth in its ruling on the government's motion for an anonymous jury.[89]

The Court does wish to add a few additional comments.

The defendants argue that had they known the juror's names, they could have discovered additional information about possible bias certain jurors had against Edwin Edwards, which would have enabled them to excuse the juror by either using a peremptory challenge or challenging the juror for cause. This

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[88]The Court has considered all of the arguments of counsel whether specifically discussed herein or not. The Court also adopts its August 22, 2000 opinion to supports its decision to deny the defendants' motion for reconsideration. See Appendix A.

[89]Rec. Doc. No. 1508; 119 F.Supp.2d 589 (M.D. La. 2000). See Appendix B.

argument is without merit. The defendants had more than sufficient information to assist them in deciding which jurors to keep or challenge. Furthermore, there is no evidence of bias on the part of any juror who returned a guilty verdict in the case. From a review of the verdict, it is obvious that the jury in this case carefully weighted all of the evidence. The jury acquitted two defendants of all charges and returned a total of 71 verdicts, which either acquitted the remaining defendants or found that the government failed to prove a racketeering act.

The facts and circumstances surrounding the case before, during and after the trial more than justify the Court's decision to use an anonymous jury. A review of the record reveals numerous attempts of some to either speak to jurors during the trial and jury deliberations, or harass and otherwise attempt to obstruct the orderly process of this trial. The court believes there would have been even more problems of this nature had the Court not empaneled an anonymous jury.

The only information the Court withheld from the parties during jury selection was the name, address and actual place of employment of the jurors. Considering the voluminous nature of the information provided to the parties about the jurors and the numerous attempts to interfere with the jury and its deliberations, the Court properly exercised its discretion to empanel an anonymous jury. Thus, the defendants are not entitled to a judgment of acquittal, or new trial, on this ground.

Trial in Absentia of Bobby Johnson, Bobby Johnson's Mistrial Motion, Defendants Motions to Sever

The Court has issued a separate opinion this date,[90] which finds that Johnson was properly tried in absentia. The Court

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[90]January 5, 2001.

adopts those findings by reference.[91] There was no need for the Court to grant a severance in this case.

Various Guilty Verdicts and the Weight of the Evidence

The defendants argue that their convictions are against the weight of the evidence.[92] Thus, defendants seek to have the Court grant a judgment of acquittal or, in the alternative, a new trial. After reviewing the record and arguments of counsel, the Court finds that the defendants are not entitled to a judgment of acquittal under the law and evidence applicable t this case.

The standard the Court must apply in determining whether to grant or deny a motion for judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure is clear. The Court must determine whether the evidence presented, viewed in light most favorable to the government, establishes the defendants' guilt beyond a reasonable doubt.[93] The Fifth Circuit has held that "[i]t is not necessary that the evidence exclude every rational hypothesis of innocence or be wholly inconsistent with every conclusion except guilt, provided a reasonable trier of fact could find the evidence establishes guilt

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[91]Rec. Doc. No. 1704. See Appendix E.

[92]Rec. Doc. No. 1475 (Defendants' Memorandum in Support of Motion for Judgment of Acquittal, Motion for New Trial). The defendants have jointly argued that their convictions are against the weight of the evidence. In addition, Stephen Edwards, Cecil Brown, and Bobby Johnson have each filed an individual motion on this issue.

[93]United States v. Duncan, 164 F.3d 239 (5th Cir. 1999); United States v. Pruneda-Gonzales, 953 F.2d 190 (5th Cir.), cert denied, 504 U.S. 978, 112 S. Ct. 2952, 119 L.Ed.2d 575 (1992).

beyond a reasonable doubt."[94]

After considering the evidence in the light most favorable to the government, the Court finds that a rational finder of fact could have found the defendants guilty beyond a reasonable doubt. Therefore, the Court hereby DENIES the defendants' motion for judgment of acquittal on those counts on which the defendants were convicted. The Court finds that the defendants are not entitled to a new trial on this basis.

Inconsistent Verdicts and Constructive Amendment/Variance

The defendants argue that: (1) the simultaneous acquittals of Greg Tarver and Ecotry Fuller and the convictions of Stephen and Edwin Edwards represent inconsistent verdicts; and (2) the government constructively amended, or varied from, the charges set forth in the superceding indictment returned in this case.[95] According to the defendants, both of these contentions warrant a judgment of acquittal or, alternatively a new trial. The defendants' arguments regarding the inconsistent verdicts on the mail and wire fraud counts are now moot because the Court has granted new trials on Counts 6, 20, 21, 22, 25, 26, and 27, based on the Cleveland case.[96]

To the extent the defendants argue that the government constructively amended the indictment or, alternatively varied from, the charges in the indictment regarding the mail and wire fraud counts, the argument is also moot for the reasons set forth

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[94]Pruneda-Gonzales, 953 F.2d at 193.

[95]Rec. Doc. No. 1475 (Defendants' Memorandum in Support of Motion for Judgment of Acquittal, Motion for New Trial), pp. 30-39.

[96]See pp. 1-2, supra.

above.

To the extent the defendants' argument regarding constructive amendment applies to other counts of the indictment, the Court finds there was no constructive amendment of the indictment. A constructive amendment argument must fail when "the indictment completely and accurately describes the conduct, so that the grand jury is not misled about the basis for the indictment."[97] The essence of a constructive amendment problem in that a defendant is convicted of an offense with which he is not charged. That is simply not the situation in this case.

A variance of the evidence is evaluated by a different standard and is found when "the evidence proves facts different from those alleged in the indictment, but does not modify an essential element of the charged offense."[98] "A variance between the wording of an indictment and the evidence presented at trial is fatal only if 'it is material and prejudices . . . [the defendant's] substantial rights.'"[99] The Court finds that even if those variances alleged by the defendants are found to exist, the defendants have not established any prejudice. The defendants cite the proper standard for evaluating prejudicial variance, namely whether "the indictment notifies a defendant adequately to permit him to prepare a defense, and does not leave the

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[97]United States v. Mikolajczyk, 137 F.3d 237, 243 (5th Cir.), cert. denied, 525 U.S. 909, 119 S. Ct. 250, 142 L.Ed.2d 206 (1998).

[98]United States v. Salvatore, 110 F.3d 1131, 1145 (5th Cir.), cert. denied, 522 U.S. 981, 118 S. Ct. 441, 139 L.Ed.2d 378 (1997).

[99]United states v. Sprick, 2000 WL 1701801, *6 (5th Cir. Nov. 14, 2000).

defendant vulnerable to a later prosecution because of failure to define the offense with particularity."[100] Each of the areas of alleged variance raised by the defendants is clearly addressed in the indictment. The Court finds that the defendants had ample information to craft a defense to the charges in the indictment. Likewise, the Court finds the indictment was sufficiently clear about those offenses charged and does not leave the defendants vulnerable to a later prosecution. As a result, the Court finds the defendants did not suffer prejudice as a result of any variance that may have occurred. The defendants are not entitled to a judgment of acquittal, or new trial, on this ground.

Money Laundering Counts Against Edwin Edwards, Stephen Edwards and Andrew Martin

The defendants contend Edwin Edwards, Stephen Edwards and Andrew Martin should be granted a new trial on their money laundering convictions under Count 34 of the indictment because: (1) there was no evidence offered which demonstrated these defendants used any illegal funds to further any unlawful activity; and (2) there was no evidence to show these defendants attempted to conceal the source, location, or nature of any of the funds.[101] The Court disagrees and finds no basis for granting a new trial on these counts.

The Court finds that there was sufficient evidence offered at trial to permit the jury to conclude that the defendants were

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[100]United states v. Hernandez, 962 F.2d 1152, 1159 (5th Cir. 1992). See also United States v. Puig-Infanti, 19 F.3d 929 (5th Cir.), cert. denied, 513 U.S. 864, 115 S. Ct. 180 L.Ed.2d 115 (1994); United States v. Lokey, 945 F.2d 825 (5th Cir. 1991).

[101]Rec. Doc. No. 14745 (Defendants' Memorandum in Support of Motion for Judgment of Acquittal, Motion for New Trial), p. 39-41.

guilty of this charge. Although the defendants argue there was no evidence at trial offered to sustain certain elements of the money laundering violation, the defendants arguments are simply a re-characterization of their broader argument that all the convictions are "against the weight of the evidence." Consequently, the Court must determine whether the jury could conclude that evidence presented, viewed in light most favorable to the government, established defendants' guilt beyond a reasonable doubt.[102] The Court has already concluded the unlawful activity predicates to support a conviction of money laundering were valid. The Court also finds that all of the other elements of money laundering have been properly proven by the United States.

The Court further finds that the indictment detailed several transactions which involved concealment of the proceeds of illegal activity[103] and demonstrated the intent of the defendants

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[102]United States v. Duncan, 164 F.3d. 239 (5th Cir. 1999); United States v. Pruneda-Gonazales, 953 F.2d 190 (5th Cir.), cert. denied, 504 U.S. 978, 112 S. Ct. 2952, 119 L.Ed.2d 575 (1992).

[103]As an example of the evidence of intent and concealment, the indictment outlined a plan created by Stephen Edwards, Edwin Edwards and Andrew Martin to conceal cash payments made by Bobby Guidry to them in exchange for assurances that Guidry's riverboat license would be approved. See, e.g., Rec. Doc. No. 306, Overt Acts 100-103. These defendants proposed purchasing a tug boat and renting it to Guidry at a highly inflated rate to conceal the illegal nature of the payments. Testimony was offered a trial to establish these facts set forth in the indictment. In addition, the indictment charges that some of the cash payments made by Guidry to the Edwards' and Martin were surreptitiously left in garbage dumpsters for Martin to recover.

to use the funds to further their illegal activities.[104] There was sufficient evidence offered at the trial to support these charges and allegations.[105] A judgment of acquittal, or new trial, is not warranted on this ground.

Right to a Public Trial

The defendants argue that they are entitled to a judgment of acquittal, or new trial, because they were denied the right to a public trial under the Sixth Amendment.[106] In addition, the

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[104]There are other examples of concealment detailed in the indictment. The indictment charged extortion of the Players Riverboat Corporation ("Players"). As a part of this scheme, Players paid sums of money to Ricky Shetler that eventually passed to Stephen and Edwin Edwards. In an attempt to conceal certain payments, instead of making a cash payoff, Ricky Shetler purchased a vehicle which was placed at Edwards' Vail condominium for Edwards' use. See Rec. Doc. No. 306, Overt Act 78. Shelter concocted a similar deal for Stephen Edwards, however Shetler purchased the van in Stephen Edwards' name. See Overt Acts 86, 88. In addition, Shetler contracted with Players for consulting services relating to the licensing of their casino while at the same time making: (1) cash payments to Stephen Edwards; and (2) purchases of goods for Stephen Edwards. See Overt Acts 76, 83, 84, 88.

[105]The defendants argue that Edwin Edwards made numerous cash expenditures publicly and therefore did not conceal the illegal nature of the payments he received. This argument is not convincing nor relevant to the facts presented in the indictment. Making certain payments publicly does not negate the concealment of others.

[106]Rec. Doc. No. 1475 (Defendants' Memorandum in Support of Motion for Judgment of Acquittal, Motion for New

defendants argue they are entitled to a judgment of acquittal, or new trial, because the press and public were denied access to the trial in violation of the First Amendment.[107] Specifically, the defendants contend the following constitute a violation of their right to a public trial: (1) the use of a gag order; (2) closure of anonymous jury related hearings; (3) the Court's order, entered on January 7, 2000, which required all newly filed documents to be placed under seal; (4) closure of certain portions of jury voir dire; (5) the supplemental gag order issued during trial; (6) the denial of the defendants' and media's motions to unseal the entire record; and (7) the Court's closure of hearings involving alleged juror misconduct. The United States has filed a response which denies that the defendants were denied a public trial.

The Court finds that the defendants are not entitled to a judgment of acquittal, or new trial, because the defendants were not denied their right to a public trail under the First or Sixth Amendments. The Court will address each of the contentions raised by the defendants separately.

During the course of the trial, the Court issued numerous written opinions on the issues raised in this part of the motion. These opinions, which are adopted herein by reference, are attached in the appendix to this opinion.[108]

The record reveals that, in this case, there was intense media interest because of the named defendants, the nature of the charges and the notoriety of some of the witnesses. There were also three separate cases where defendants in one case were also named as defendants or unindicted co-conspirators in the other

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Trial, p. 42-49.

[107]Id. at 42.

[108]See Appendices B, C, D, and F.

case.

In an effort to limit any extra-judicial and prejudicial publicity associated with this trial, the Court issued an order which prohibited certain public comments by the parties and their counsel.[109] The defendants argue that this order interfered with their rights to a public trial and prevented them from discussing the trial in the press. The Court finds that the order issued by the Court was a proper and necessary measure to limit the harmful and prejudicial effects on the unsequestered jury in this case.

The Supreme Court has long recognized that an atmosphere essential to the preservation of a fair trial is one of the most fundamental rights held by litigants.[110] In addition, trial courts have an affirmative duty to take steps to minimize the effects of prejudicial pre-trial publicity.[111] "The beneficiaries of this duty [to minimize pre-trial publicity] include not only the defendant in a given trial, but other defendants as well, such as co-defendants in the same case or defendants in related cases . . . whose fair trial rights might be prejudiced by the extrajudicial statements of other trial participants."[112] A district court may "impose an appropriate gag order on parties and/or their lawyers if it determines that extrajudicial commentary by those individuals would present a 'substantial likelihood' of

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[109]Rec. Doc. No. 3

[110]Estes v. Texas, 381 U.S. 532, 85 S. Ct. 1628, 14 L.Ed.2d 543 (1965).

[111]Gannett Co. v. DePasquale, 443 U.S. 368, 99 S. Ct. 2898, 61 L.Ed.2d 608 (1979).

[112]United States v Brown, 218 F.3d 415, 424 (5th Cir. 2000), petition for cert. filed, 69 U.S.L.W. 3157 (U.S. Aug. 21, 2000) (No. 00-277).

prejudicing the court's ability to conduct a fair trial."[113]

The Court imposed the order in this case based on the "substantial likelihood" that the media attention relating to this case would impair the Court's ability to select an untainted jury and conduct a fair trial. To prevent a "trial by press" atmosphere, the Court entered an order which prohibited the parties from making certain extrajudicial statements. However, the Court did not completely prevent the parties from commenting about the trial or the proceedings before the Court. After witnessing significant violations of the gag order and attempts to make prejudicial statements in the press, the Court entered a more strict order which prohibited any extrajudicial comments by the parties or their counsel.[114] The Court issued this order after the trial of this case commenced.[115]

In addition to issuing an order in this case, the Court also issued a similar order in United States v. Brown.[116] The parties in Brown, including the defendant Edwin Edwards, appealed the Court's decision. The Fifth Circuit affirmed the order issued by the Court. Because the orders are so similar, the opinion issued by the Fifth Circuit in Brown is imperative to a resolution to the pending motion.

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[113]Brown, 218 F.3d at 427.

[114]The Court's supplemental order was based on a virtually identical order issued by Judge Walter Smith in United States v. Branch, Docket No. 93-Cr-046 (W.D. Tex. 1994), rev'd in part on other grounds, 91 F.3d 699 (5th Cir. 1996), cert. denied, 520 U.S. 1185, 117 S. Ct. 1466, 137 L.Ed.2d 681 (1997).

[115]Rec. Doc. No. 1010.

[116]CR No. 99-151.

The Fifth Circuit affirmed, in Brown, the very same gage order the defendants now attack in their post-trial motions.[117] In upholding this Court's order issued in United States v. Brown, the panel recognized that "the district court did identify a 'substantial likelihood' that the extrajudicial comments of the trial participants would prejudice its ability to conduct fair trials in all three related cases."[118] The Court also recognized the intense media surrounding the present case and the other two pending cases, as well as the potential for harmful and prejudicial publicity if the participants were permitted to make unrestricted public comments about the case.[119] The Fifth Circuit further noted how the parties were attempting to use the press in Brown, which is exactly what the defendants were doing in this case. The Court has already issued an opinion in the Brown case explaining the effect of the Fifth Circuit's opinion on the gage order.[120] This opinion is adopted by reference and attached as an appendix to this opinion.[121]

The defendants also contend the Court erred when it closed certain hearings and proceedings during the course of trial. Defendants argue the Court improperly closed the hearings related to the anonymous jury motion. Defendants also argue that the Court should have held arguments on the parties' peremptory challenges and Batson arguments in public. Defendants contend that closure of these hearings amounted to

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[117]United States v. Brown, 218 F.3d 415 (5th Cir. 2000), petition for cert. filed, 69 U.S.L.W. 3157 (U.S. Aug. 21, 2000) (No. 00-277).

[118]Id at 428.

[119]Id.

[120]CR No. 99-151; Rec. Doc. No. 87.

[121]See Appendix F.

a denial of the right of the defendants to a public trial.

The Court finds no merits to these arguments. The hearings related to the anonymous jury motion were properly closed to the press and public because of the sensitive nature of the information discussed and the Court's finding that the information could potentially cause prejudice to the fair trial rights of the defendants. The Court also wanted to limit access to certain information which would otherwise identify the jurors. Even though the Court empaneled an anonymous jury, certain individuals and even the media were able to identify, contact, harass and even talk to certain jurors. The Court can only wonder how many more jurors would have been affected if the Court had not proceeded the way it did. The Court has previously assigned lengthy reasons for closing the courtroom and denying the defendants' motion to unseal. Consequently, the Court will not reiterate those reasons in this opinion.[122] As to the defendants' Batson arguments, the Court advised the parties, prior to trial, that Batson arguments would be delivered to the Court at a bench conference, as opposed to publicly.[123] The defendants did not object to this procedure. This conference was in essence a bench conference, but because of logistical difficulty in holding a bench conference with sixteen lawyers, the Court elected to briefly close the courtroom to allow the parties to freely present their arguments. This closure was proper because trial courts are not obligated to conduct bench conferences in a

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[122]See Rec. Doc. No. 559, Appendix D.

[123]Rec. Doc. No. 1698 (Tr. 1/9/00). The Court clearly advised the parties of this procedure and no objections were lodged. The Court said: "Before I swear the jury in, I will ask you to approach the Bench and you will let me know whether or not you have any Batson motions." Rec. Doc. No. 1698, p. 34 (Tr. 1/9/00).

public setting.[124] This procedure is also designed to avoid any prejudice a party might suffer because of a of a prospective juror learning who sought to excuse a juror and the reasons given by a party for doing so.

The defendants also challenge the Court's procedures regarding sealed documents.[125] Defendants argue that the Court improperly denied their motion, made during the trial, to unseal all sealed documents and records. The defendants also challenge the Court's order which required all documents be filed under seal. Neither of these arguments have merit. The Court has addressed the defendants' motion to unseal in a prior ruling, which is adopted herein by reference.[126] The Court was forced to issue the order requiring records to be filed under seal to curtail the parties' attempts to circumvent the Court's gag order which limited certain extrajudicial comments by the parties, and to limit the obviously prejudicial comments being made by the parties essentially for the press' consumption. The Court's sole purpose in issuing the gag order, sealing records and closing hearings was to ensure all of the parties had a fair and impartial trial and to shield jurors from prejudicial and inflammatory comments. The actions the Court took were the least restrictive available and were based solely on the facts of the case. The defendants are not entitled to a judgment of acquittal, or new

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[124]United States v. Edwards, 823 F.2d 111, 115 (5th Cir. 1987), cert. denied, 485 U.S. 934, 108 S. Ct. 1109, 99 L.Ed.2d 270 (1988). The Court has also addressed this issue in its ruling on the media's motion for access to certain documents and documents. See Rec. Doc. No. 1507, p. 20-21.

[125]The Court has addressed these procedures at length in the media-related opinion and adopts the reasons set out therein. See Rec. Doc. No. 1507, Appendix C.

[126]Rec. Doc. No. 559. See Appendix D.

trial, on this ground.

DEFENDANTS' RIGHT TO COUNSEL AT CRITICAL STAGES OF THE TRIAL

The defendants argue that they were denied the right to counsel at critical stages of the trial.[127] Specifically, the defendants argue they were denied the right to counsel during the Court;'s in camera interviews of members of the jury because the Court only permitted two representative attorneys, from each side, to be present during the interviews. The Court finds that the defendants were not denied the right to counsel and their arguments do not warrant a judgment of acquittal, or new trial, on this ground.

During the course of the trial, it was necessary to interview a number of jurors. A procedure was agreed on to have two representatives from each side present so as not to intimidate the juror.[128] The Court believed it was more appropriate to interview the jurors in the conference room rather than have the jurors sit in the witness chair or in the jury box. When the Court received the notes from the jury while the jury was deliberating, the court changed the procedure to avoid any prejudice the hearing might have on the jurors. Defendants particularly complain about the questioning of Juror #68.

The Court has previously set forth, in this opinion, a clear account of the procedures which surrounded the removal of juror

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[127]Rec. Doc. No. 1475 (Defendants' Memorandum in Support of Motion for Judgment of Acquittal, Motion for New Trial), p. 50.

[128]The Court also allowed the defendants to bring their paralegal, Mary Jane Marcantel, to all of the conferences.

#68.[129] The Court interviewed not only Juror #68 but all of the members of the jury regarding the notes sent to the Court. As noted earlier, due to the large number of lawyers involved, the Court was very concerned that some jurors would feel intimidated if questioned with all counsel present. The Court was further concerned that this intimidation might discourage frank answers from the jurors. Because the Court sought to afford counsel the right to participate in the hearing, while at the same time limiting the effect the hearing would have on the jurors, the Court followed a procedure which balanced both concerns.[130] Outside the presence of the jurors, the Court first discussed, with counsel, questions to be asked of the jurors. The Court then excused the lawyers and brought in a juror. After asking the juror the agreed upon questions, the Court excused the juror and then brought the lawyers back into the conference room, where the Court played a tape of the Court's questions and the juror's answers. The Court then gave the parties an opportunity to suggest follow-up questions. This procedure was followed for each juror and the transcript reflects that all counsel were given an opportunity to participate in the discussion of the questions to be asked of each juror.[131] Thereafter, the Court allowed the parties to have two representatives present for the questioning of the jurors.

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[129]See pp. 9-30, supra.

[130]Rec. Doc. No. 1605 (Sealed Tr. 5/2/00); Rec. Doc. No. 1606 (Redacted Tr. 5/2/00). In United States v. Thomas, 116 F.3d 606 (2nd Cir. 1997), the district court followed a similar procedure where it conducted the juror interviews in camera with no counsel present. The Second Circuit implicitly approved this procedure.

[131]Rec. Doc. No. 1605, pp. 101-283 (Sealed Tr. 5/2/00); Rec. Doc. No. 1606, pp. 101-283 (Redacted Tr. 5/2/00).

The defendants also argue that the Court refused to allow counsel to participate in the proceedings regarding Juror #68.[132] In support of their arguments, the defendants cite an excerpt of the trial transcript in which the Court instructed the marshals to close the courtroom. This excerpt and argument is a total and unfortunate mis-characterization of the events which related to this hearing. A review of the transcript reveals that at the end of the day, after the court had completed the questioning of witnesses regarding Juror #68, the Court held a conference with two representatives from each side. During this questioning, three of the attorneys[133] present at the conference engaged in a shouting match that caused the Court to request the deputy marshals to remove them from the conference room.[134] After the deputy marshals removed the attorneys from the conference room, the Court ordered that the attorneys be brought to the courtroom and separated from each other. The Court took this drastic step because of the Court's concern for the personal safety of the attorneys as well as members of the Court's staff who were present.[135] When the lawyers arrived in the courtroom,

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[132]Rec. Doc. No. 1475 (Defendants' Memorandum in Support of Motion for Judgment of Acquittal, Motion for New Trial), p. 50.

[133]The attorneys involved in this incident were: Jim Letten, James Cole and Dan Small. Although Todd Greenberg was present, he did not participate in this unfortunate incident.

[134]The Court was fortunate to have two marshals in the conference room, who removed the attorneys through separate doors.

[135]Rec. Doc. No. 1607, pp. 243-246 (Sealed Tr. 5/3/00); Rec. Doc. No. 1608, pp. 243-246 (Redacted Tr. 5/3/00). The Court moved the lawyers to the courtroom to conduct the remainder of the discussion in an attempt to avoid a possible fight between the lawyers and to restore order.

they apparently began arguing again. The Court then entered the courtroom. Thereafter, an attorney representing one of the defendants attempted to enter the courtroom. The Court, because of the volatile nature of what had just occurred in chambers and in the courtroom, asked the attorney to leave the courtroom. The Court then allowed the parties to deliver their remarks in the courtroom and adjourned for the day. All counsel were allowed to participate in a hearing held on the following day to assert their arguments for and against the remove of Juror #68.[136] A judgment of acquittal, or new trial, is not warranted on this ground.

Admission of Hearsay Evidence

The defendants object to the admission of certain statements of co-conspirators and statements offered to show the witnesses' state of mind.[137] The Court finds, for oral reasons previously given, that the evidence was properly admitted in accordance with the Federal Rules of Evidence.

During the course of the trial, the Court considered the government's request to admit co-conspirator statements, as permitted by Rule 801 of the Federal Rules of Evidence. Although frequently referred to as an "exception" to the hearsay rule, Rule 801(d)(2)(E) indicates that "a statement by a coconspirator of a party during the curse and in furtherance of the conspiracy" is not a hearsay statement.[138] The Supreme

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[136]Rec. Doc. No. 1607, pp. 265, 275 (Sealed Tr. 5/3/00); Rec. Doc. No. 1608, pp. 265, 275 (Redacted Tr. 5/3/00).

[137]Rec. Doc. No. 1475 (Defendants' Memorandum in Support of Motion for Judgment of Acquittal, Motion for New Trial), 53-59.

[138]Fed. R. Evid. 801(d)(2)(E).

Court has ruled that a co-conspirator's statement may be admitted when the trial judge finds that a conspiracy existed and that the statement was made during and in furtherance of the conspiracy.[139] The evidence must establish these factors by a preponderance of the evidence.[140] The Court considered the arguments of counsel during the trial as to the admissibility of certain co-conspirator statements.[141] The Court made the appropriate findings at the time the evidence was introduced and at the close of the case.

On the government's motion, the Court issued the following ruling on the statements of the co-conspirators at the conclusion of the case:

> The court, at the end of the trial has to make a finding, and the Court so finds that the prosecution has shown, by a preponderance of the evidence, that in those charges where conspiracy is involved, or where there were unindicted co-

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[139]Bourjaily v. United States, 483 U.S. 171, 107 S. Ct. 2775, 97 L.Ed.2d 144 (1987).

[140]Bourjaily, 483 U.S. at 175, 107 S. Ct. at 2779.

[141]Although the defendants argue that all co-conspirator statements offered during the trial were admitted in contravention to the rules of evidence, they only cite one example-the testimony of Sam Gilliam. Prior to the admission of Gilliam's testimony, the Court received a proffer of evidence regarding Gilliam's participation in the conspiracy. After considering the evidence submitted and the arguments of counsel, the Court found the requisite showing was established by a preponderance of the evidence. The Court then gave oral reasons for admitting these statements. See Rec. Doc. No. 1021 (Tr. 2/8/00).

> conspiratory situations, that a conspiracy existed, that the co-conspirator and the defendant against whom the co-conspirator's statement is offered, are members of the conspiracy. And the Court finds that the statements made were made during the course of and in furtherance of the conspiracy.
>
> The court makes a such a finding for each of the defendants who were charged as conspirators or co-conspirators, or unindicted co-conspirators in this case. And the court finds that an appropriate finding. That a preponderance of evidence has been established is so made by the court."[142]

The Court's finding comports with the Supreme Court's ruling in Bourjaily and Fifth Circuit law.[143]

Statements of a witnesses' "then existing mental, emotional or physical condition" are excluded from the hearsay rule under FRE 803(3) provided they are not admitted to prove the truth of the matter asserted.[144] The defendants complain that certain statements were improperly admitted ruing the trial pursuant to this exception to the hearsay rule. As an example,

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[142]Rec. Doc. No. 1699, p. 14 (Tr. 4/17/00).

[143]See United States v. Cornett, 195 F.3d 776 (5th Cir. 1999); Unites States v. Broussard, 80 F.3d 1025 (5th Cir.), cert. denied, 519 U.S. 906, 117 S. Ct. 264, 136 L.Ed.2d 189 (1996).

[144]United States v. Hyde, 448 F.2d 815 (5th Cir. 1971), cert. denied, 404 U.S. 1058, 92 S. Ct. 736, 30 L.Ed.2d 745 (1972).

the defendants cite the testimony of C.J. Blache.[145] The record reflects that this testimony was offered, not to prove the truth of the matter asserted, but rather to establish the witnesses' state of mind at the time of the incident. This fully satisfied the requirements of Rule 803.

After reviewing the argument regarding the defendants' objections to evidentiary rulings made by the Court, the Court finds the evidence was properly admitted under the Federal Rules of Evidence. To the extent the Court may have erred in any evidentiary ruling, the Court finds such evidence does not warrant a finding that a new trial or judgment of acquittal should be granted.

Admission of Communications Between Cecil Brown and His Attorneys

The defendants argue that the Court improperly admitted recordings of intercepted telephone conversations between the defendant, Cecil Brown, and his attorneys, which occurred during a civil suit.[146] According to the defendants, this evidence was not only privileged information, it was highly prejudicial to Cecil Brown.

The Court has previously considered the admissibility of these recordings. Prior to trial, the government filed a motion in limine regarding the admissibility of these tapes, which the

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[145]Rec. Doc. No. 1475 (Defendants' Memorandum in Support of Motion for Judgment of Acquittal, Motion for New Trial), p. 58.

[146]Rec. Doc. No. 1475 (Defendants' Memorandum in Support of Motion for Judgment of Acquittal, Motion for New Trial), p. 59.

defendants opposed.[147] The Court granted the government's motion in limine and permitted these tapes to be introduced at trial based on the crime/fraud exception to the attorney-client privilege.[148] The defendants do not raise any new arguments in their post-trial motions on the issue. Therefore, the Court adopts its prior reasons for admitting this evidence at the trial.

Recusal in this Case Based on Recusal in United States v. Brown

In a supplement to their motion for a new trial, the defendants argue that the jury's verdict should be set aside because this judge should have recused himself in this case.[149] In support of this argument, the defendants cite the Court's recusal in United States v. Brown.[150] The Court recused itself in Brown for two principal reasons: (1) the name of the U.S. Attorney for the Middle District of Louisiana was set forth in the indictment and it was possible he would be called as a witness in the Brown trial; and (2) the Court had received a telephone call from a witness regarding the job qualifications of another possible witness.[151]

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[147]Rec. Doc. No. 756.

[148]Rec. Doc. No. 858. The Court's ruling was, in part, based on a ruling issued by Judge Parker in conjunction with the grand jury investigation of this matter which had been placed under seal. See Rec. Doc. No. 858, p. 1, n. 3.

[149]Rec. Doc. No. 1489.

[150]See CR No. 99-151, Rec. Doc. Nos. 254 (order), 261 (written reasons).

[151]This phone call occurred prior to the beginning of any federal investigation.

The defendants now argue that because the government presented evidence from Brown in support of its motion for anonymous jury, the Court's reasons for recusing itself in Brown should likewise apply to this case.[152] The defendants' arguments are without merit. In deciding the anonymous jury matters, the jurisprudence clearly indicates that the Court was not required to make credibility assessments. The Court was only required to look to allegations that, if true, would justify the impanelment of an anonymous jury.[153] The Court has previously noted that the evidence offered in support of the anonymous jury motion in this case was more than ample to justify granting the motion, even if the Court did not consider the allegations against Edwin Edwards discussed in the Brown indictment.[154] This Court had no reason in law or fact to recuse itself in this case.[155]

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[152]Specifically, the defendants argue that: (1) the government referenced the insurance indictment and the guilty plea of Judge Sanders in support of their motion for anonymous jury; (2) the government specifically cited the alleged witness tampering of Ed Gonzales as a basis for granting the anonymous jury motion in this case; (3) by doing so, the Court was required to make a credibility determination regarding Ed Gonzales' testimony. See Rec. Doc. No. 1489, p. 4.

[153]See Rec. Doc. No. 1508 (anonymous jury ruling), Appendix B. See also United States v. Krout, 66 F.3d 1420 (5th Cir. 1995), cert. denied, 516 U.S. 1136, 116 S. Ct. 963, 133 L.Ed.2d 884 (1996); United States v. Paccione, 949 F.2d 1183 (2nd Cir. 1991), cert. denied, 505 U.S. 1220, 112 S. Ct. 3029, 120 L.Ed.2d 900 (1992).

[154]Rec Doc. No. 1508, p. 16, n. 50.

[155]The defendants also filed a pretrial motion to recuse. The Court denied this motion for written reasons assigned. This opinion is adopted herein by reference. See Rec. Doc. No. 81, Appendix G.

Conclusion

The Court has very carefully considered all of the arguments and contentions of the parties, whether specifically discussed herein or note. After reviewing the entire record, the Court finds that the defendants received fair and impartial trial. The Court further finds that the guilty verdicts returned by the jury are fully supported by the law and evidence in this case. It is apparent that the jury which heard this case carefully and meticulously reviewed the evidence and applied the law as given to it by the Court before returning their verdicts in this case. There are no legal or factual reasons for the court to disturb the jury's verdict except on those counts for which a new trial was required under Cleveland.

Therefore, IT IS ORDERED that defendants' motions for judgment of acquittal and post-verdict judgment of acquittal be and each is hereby DENIED.

IT IS FURTHER ORDERED that defendants' motion for a new trial is GRANTED on the following counts and on behalf of the following defendants:

Bobby Johnson - Count 6;

Edwin Edwards - Counts 20, 21, 22, 25, 26 and 27;

Steven Edwards - Counts 20, 21, 22, 25, 26 and 27.

IT IS FURTHER ORDERED that in all other respects, defendants' motion for a new trial be and it is hereby DENIED.

IT IS SO ORDERED.

Baton Rouge, Louisiana, January 5, 2001.

/s/

FRANK J. POLOZOLA, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

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119 F.Supp.2d 589
(Cite as: 119 F.Supp.2d 589)

United States District Court,
M.D. Louisiana.
UNITED STATES of America
v.
Edwin EDWARDS, et al.
No. Crim.A. 98-165-B-M2.
July 27, 2000.

United States filed a motion for an anonymous jury in prosecution based on alleged attempts to corrupt legal system for awarding riverboat gaming licenses. The District Court, Polozola, Chief Judge, held that totality of all of the circumstances established a clear and actual need to withhold the names, addresses and places of employment of the jurors.

Motion granted.

West Headnotes

[1] Jury k144
230k144

Factors that may justify anonymity of a jury include: (1) defendant's involvement in organized crime; (2) defendant's participation in a group with the capacity to harm jurors; (3) defendant's past attempts to interfere with the judicial process or witnesses; (4) potential that, if convicted, defendant will suffer a lengthy incarceration and substantial monetary penalties; and (5) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation and harassment.

[2] Jury k144
230k144

Courts may receive evidence in camera and/or ex parte in ruling on motion for anonymous jury.

[3] Jury k144
230k144

Motion for anonymous jury may also be determined by the trial court without any hearing on the matter.

[4] Jury k144
230k144

Totality of all of the circumstances established a clear and actual need to withhold the names, addresses and places of employment of the jurors since empaneling an anonymous jury was the only manner in which court could ensure that jurors were protected from outside influence and intimidation from persons associated with the government, the defendants, the media, and individuals who had an interest for or against any of the parties or the jurors; crimes charged suggested attempts to corrupt legal system for awarding riverboat gaming licenses, there was evidence pertaining to matters involving jury selection and possible jury tampering in two earlier criminal trials involving key defendant, each defendant faced substantial terms of imprisonment and staggering penalties and forfeitures if convicted, and extensive publicity of the proceedings enhanced the possibility that jurors' names would become public, thereby exposing them to possible intimidation, harassment, and attempted media contacts during the trial.

[5] Jury k144
230k144

Once decision to empanel an anonymous jury is made, trial court must take appropriate action to ensure the parties are given adequate voir dire to allow the parties to have sufficient information to meaningfully exercise their challenges; focus of the inquiry is whether the defendants were prejudiced in selecting an impartial jury because relevant and meaningful information was withheld from them.

[6] Jury k144
230k144

Defendants' rights to intelligently exercise peremptory challenges would not be impaired by empaneling an anonymous jury where parties were provided with an "arsenal of information" based upon the extensive questionnaires completed by potential jurors, as well as court's individual voir dire of potential jurors.

[7] Jury k144
230k144

Defendants' constitutional rights to a presumption of innocence until proven guilty beyond a reasonable doubt would not be impaired by empaneling an anonymous jury where jurors were provided with neutral, nonprejudicial reasons for the court's decision in order to protect the defendants' constitutional right to a fair trial.

*590 James B. Letten, Peter G. Strasser, Dept. of Justice, U.S. Atty.'s Office, New Orleans, LA, Michael William Manger, U.S. Atty.'s Office, E.D. La., New Orleans, Thomas L. Watson, Dept. of Justice, U.S. Attys. Office, New Orleans, LA, Eddie J. Jordan, Jr., U.S. Atty.'s Office, New Orleans, LA, Stephen A. Higginson, U.S. Atty.'s Office, E.D. La., New Orleans, LA, for U.S.
Richard G. Crane, Corrections & Sentencing Law, Nashville, TN, Daniel I. Small, Butters, Brazilian & Small, LLP, Boston, MA, for
Edwin Edwards.

Edwin Edwards, Baton Rouge, LA, pro se.
Stephen Edwards, Baton Rouge, LA, pro se.
James M. Cole Bryan Cave LLP, Washington, DC, for Stephen Edwards.
Rebecca L. Hudsmith, Federal Public Defenders Office, Lafayette, LA, for Cecil Brown.
Servando C. Garcia, III, Ryan J. Roemershauser, Garcia & Bishop, Metairie, LA, William H. Jeffress, Jr., James R. Heavner, Jr.,
Miller, Cassidy, Larroca & Lewin, LLP, Washington, DC, for Andrew Martin.
James Michael Small, Law Offices of J. Michael Small, Alexandria, LA, for Bobby Johnson.

RULING

FOLOZOLA, Chief Judge.

The United States of America [FN1] filed a Motion for an Anonymous Jury in this case. [FN2] The defendants opposed the motion. [FN3] On January 7, 2000, the Court granted the government's motion. [FN4] The Court now assigns its reasons for granting the government's motion.

FN1. The United States of America will hereinafter sometimes be referred to as "the government" and "the United States."

FN2. Rec.Doc. No. 278.

FN3. Rec.Doc. No. 296.

FN4. Rec.Doc. No. 887.

BACKGROUND

The grand jury for the Middle District of Louisiana returned a 34-count indictment and later a superseding indictment against Edwin W. Edwards, Stephen Edwards, Cecil Brown, Andrew Martin, Bobby Johnson, Gregory Tarver, and Ecotry Fuller. This indictment charged, among other things, violations of Racketeer Influenced Corrupt Organization Act ("RICO"), [FN5] RICO conspiracy, mail and wire fraud, illegal wiretapping, money laundering and extortion. Because of the high media interest in this case, the Court issued a "gag order" on November 9, 1998 [FN6] and February 9, 2000 [FN7] in an attempt to control prejudicial statements made by the parties in this case and to ensure the parties would receive a fair trial with an impartial jury. The Court also issued a credentialing order for members of the media and another order allowing the press to have a place to conduct interviews outside of the federal courthouse. [FN8] To further ensure a fair and impartial jury which would not be subject to improper and prejudicial contact, influence, or harassment from the parties, the press and others, the Court granted the government's motion for an anonymous jury to the extent the Court withheld the *591 names, addresses [FN9] and places of employment of the jurors from the parties, the media and the public. The Court now assigns reasons to support its decision.

FN5. 18 U.S.C. s 1961.

FN6. Rec.Doc. No. 3.

FN7. Rec.Doc. No. 1010.

FN8. Rec.Doc. Nos. 47 (Credentialing Order) and 292 (Media Bullpen Order).

FN9. As will be noted later, while the Court did not give the specific street address, the Court did provide the parties with the

juror's zip code and parish of residence.

CONTENTIONS

The government requested an anonymous jury for the following reasons: (1) "Edwin Edwards is alleged to have been the central figure of an enterprise which corrupted a major industry in the State of Louisiana;" [FN10] (2) Edwin Edwards accomplished the alleged illegal acts "in large measure through the power of his elected office as governor;" [FN11] (3) Edwin Edwards and Stephen Edwards are charged with interfering with the lawful judicial process, specifically conspiring to obtain illegal wiretaps of the homes of FBI agents who were investigating their criminal activity; (4) Edwin Edwards is charged with interfering with the lawful judicial process, specifically attempting to bribe Judge Alfred Foster Sanders, III and offering to terminate a pending investigation being conducted by the United States Attorney for the Middle District of Louisiana; [FN12] (5) all defendants potentially face lengthy prison sentences; and (6) the potential for publicity and/or harassment of jurors due to the high level of media scrutiny. [FN13]

FN10. Rec.Doc. No. 278.

FN11. Rec.Doc. No. 278.

FN12. These acts are alleged in the indictment filed in United States v. James Brown, Alfred Foster Sanders, III, Edwin Washington Edwards, Robert Andre Bourgeois, David Judd Disiere, and Ronald R. Weems, Cr-99-151 (M.D.La.). Alfred Foster Sanders, III and Robert Andre Bourgeois have entered guilty pleas in that case.

FN13. The government submitted the following affidavits in support of the motion for anonymous jury: (1) FBI Agent Dennis Horner; (2) FBI Agent Dennis Swikert; (3) Josephine Beninati, Financial Analyst with the FBI; (4) FBI Agent Theresa Hultz;

(5) Supervising FBI Agent Geoffrey Santini; and (6) Sid Moreland. The government also submitted the following exhibits: (1) the factual basis underlying Dempsey White's plea agreement; (2) an article which appeared in the Baton Rouge Advocate on July 2, 1999; (3) a transcript from a wiretap of a conversation between Constance A. Koury and Edwin Edwards; (4) an AP wire article dated January 17, 1986; (5) the indictment filed in United States v. James Brown, et al; and (6) the superseding bill of information and factual basis related to Judge Foster Sanders, who pled guilty in United States v. James Brown, et al.

The defendants have filed an opposition to the motion for anonymous jury based on the following reasons: [FN14] (1) there is no evidence of any of the defendants being tied to "organized crime" in the traditional sense; (2) there is no evidence of physical harm present; (3) the defendants have not interfered with the judicial process; (4) the defendants would suffer prejudice if an anonymous jury is empaneled; and (5) there is a strong potential to adversely affect the exercise of their peremptory and cause challenges during voir dire. Defendants rely heavily on the factors enunciated in United States v. Krout [FN15] to support their arguments.

FN14. The defendants submitted the following affidavits in opposition to the motion for anonymous jury: (1) Camille Gravel; (2) Evelyn Gravel; (3) Debbie Baer (two affidavits); (4) Mike Baer; (5) Ann Davenport; (6) Victor Bussie; (7) Fran Bussie; Susan McDuff Fontenot; (8) Edwin Edwards; and (9) Patrick Fanning. Defendants also submitted an excerpt from a conference in the chambers of Judge Vance in the matter of United States v. Cleveland on June 19, 1997, and statements made by Patrick Fanning in open court on September 17, 1999.

FN15. 66 F.3d 1420 (5th Cir.1995).

Oral argument was held on the motion on September 14, 16 and 17, 1999. The Court granted the motion and noted it would assign written reasons at a later date. These reasons now follow.

LEGAL STANDARDS

The issue of whether a court may use an anonymous jury in the trial of a defendant *592 charged with a criminal offense is not a matter of first impression. The Fifth Circuit as well as other circuits have approved the use of an anonymous jury under certain circumstances. A review of the jurisprudence from the Fifth Circuit and the facts of this case support the Court's decision to use a partially anonymous jury herein. While the Court did grant the government's motion to use an anonymous jury in this case, the use of the term "anonymous" is very misleading. It is true the Court did not give the parties, the media or the public the names, addresses or places of employment of the jurors. However, the Court did provide all concerned with a voluminous amount of information about each juror. The Court used a 28-page questionnaire which was answered by each potential juror and consisted of 116 questions, some with numerous sub-parts. [FN16] In addition, the Court conducted an extensive voir dire of the potential jurors comprising approximately 2,000 pages of transcript. The parties were permitted to suggest questions and follow up questions to be asked of each juror. All of the parties had an exhaustive amount of knowledge about each juror which allowed each of them to make an informed decision on which jurors should be accepted, challenged for cause, or peremptorily challenged. The Court now turns to a discussion of the jurisprudence from the Fifth Circuit on this issue.

FN16. A copy of the questionnaire used is attached as Appendix A to this opinion. The parties stipulated to the questions set forth in this questionnaire.

The Fifth Circuit Court of Appeals first addressed the issue of whether it was proper to have an anonymous jury in United States v. Krout. [FN17] In Krout, as in this case, the names, addresses, and places of employment of the jurors were withheld. Relying on jurisprudence from the Second Circuit, the Fifth Circuit set forth several factors that may justify anonymity of a jury: (1) the defendant's involvement in organized crime; (2) the defendant's participation in a group with the capacity to harm jurors; (3) the defendant's past attempts to interfere with the judicial process or witnesses; (4) the potential that, if convicted, the defendant will suffer a lengthy incarceration and substantial monetary penalties; and (5) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation and harassment. [FN18]

FN17. 66 F.3d at 1420.

FN18. Krout, 66 F.3d at 1427 (citations omitted).

In Krout, the Fifth Circuit affirmed the trial court's decision to empanel an anonymous jury. The appellate court found that the district court's decision was supported by the evidence adduced at the trial and by the wiretap affidavits presented by the government. Additionally, the Fifth Circuit found that the "Texas Mexican Mafia" was an inherently dangerous organization. Since Krout was decided, a number of Fifth Circuit decisions have upheld use of anonymous juries under a variety of circumstances. A careful review of those cases is in order. In United States v. Riggio, [FN19] the defendant was indicted for conspiracy to commit arson and use of fire to commit a federal felony. Concerned about possible jury tampering, the trial court assigned numbers to the jurors to assure anonymity. The trial court based its decision to use an anonymous jury on the following factors: (1) the record reflected that witnesses were allegedly threatened; [FN20] (2) the defendant had been accused of jury tampering in a previous case; and (3) there were alleged ties of the defendant to organized crime. In affirming

the district court, the *593 Fifth Circuit stated the following with respect to the propriety of empaneling an anonymous jury:

FN19. 70 F.3d 336 (5th Cir.1995).

FN20. "The record reflects that witness A was told he would be a 'dead mother' if he cooperated, witness B was told Riggio would 'blow his brains out,' and witness C was told that the witnesses would become a part of 'history ... real quick.' " 70 F.3d at 338.

In determining whether jurors need protection, the district court should consider the defendant's involvement in organized crime, his past attempts at interfering with judicial proceedings, his previous history of violence, the extent of press coverage, and the likelihood of juror harassment or intimidation. [FN21]

FN21. Riggio, 70 F.3d at 339-340 (emphasis added) (citing United States v. Paccione, 949 F.2d 1183 (2nd Cir.1991)).

The Fifth Circuit also noted that Riggio had "committed fraud in order to serve on another jury, demonstrating a lack of respect for the judicial process and suggesting that he was capable of and willing to interfere with the jury system." [FN22] The Court also noted that "[t]he district court had a reasonable basis to conclude that similar threats and attempts at intimidation were likely to be made to the jurors if their identities were known." [FN23]

FN22. Riggio, 70 F.3d at 340, n. 21.

FN23. Riggio, 70 F.3d at 340, n. 22.

In United States v. Branch, [FN24] a trial involving the Branch Davidians, the district court sua sponte ordered the use of an anonymous jury. The Fifth Circuit upheld the trial court's decision. However, in doing so, the Fifth Circuit stated that

referring to the jury as "anonymous" was misleading for the following reasons:

FN24. 91 F.3d 699 (5th Cir.1996), cert. denied, Branch v. United States, 520 U.S. 1185, 117 S.Ct. 1467, 137 L.Ed.2d 681 (1997).

Anonymity has long been an important element of our jury system. Jurors are randomly summoned from the community at large to decide the single case before them and, once done, to "inconspicuously fade back into the community." "Anonymous jury" has come to mean something different in recent years, signaling the district court's decision to withhold certain biographical information about potential jurors from the parties involved. That said, we should be wary of painting with too broad a brush. "Anonymous" juries include those about whom more has been concealed than here. The jurors here were not "anonymous" except in the most literal sense. The district court ordered only the jurors' names and addresses be withheld from the parties. Otherwise, the court provided the defendants with a wealth of information about the venire, including occupations and names of employers. [FN25]

FN25. Branch, 91 F.3d at 723 (citations omitted).

Thus, the Fifth Circuit does not consider a district court's decision to withhold the names and addresses of the jurors to truly qualify the jury as "anonymous."

The Branch Court further stated that the trial court is required to "make a sensitive appraisal of the climate surrounding a trial and a prediction as to the potential security or publicity problems that may arise during the proceedings." [FN26] In discussing the Krout factors, the Fifth Circuit stated that there was no intent to suggest that "these or some aggregate must be established on pain of reversal." [FN27] The Court stressed that district courts should look to the "totality of the circumstances." [FN28]

FN26. Branch, 91 F.3d at 723 (citing United States v. Childress, 58 F.3d 693, 702 (D.C.Cir.1995), cert. denied, 516 U.S. 1098,
116 S.Ct. 825, 133 L.Ed.2d 768 (1996)).

FN27. Branch, 91 F.3d at 724.

FN28. Branch, 91 F.3d at 724 (citing United States v. Ross, 33 F.3d 1507, 1521 (11th Cir.1994)) (emphasis added).

The trial court in Branch based its decision to withhold the names and addresses of the jurors on a number of factors. Specifically, the court found that an anonymous jury was proper "because of the 'enormous amount of world-wide attention' generated by the case and the emotionally charged atmosphere surrounding it. Not *594 all celebrated trials merit an anonymous jury, but '[t]he prospect of publicity militates in favor of jury anonymity to prevent exposure of the jurors to intimidation or harassment.'" [FN29] Because the defendants in Branch were furnished with answers to eighty (80) detailed questions, the defendants' ability to select an impartial jury had not been prejudiced. The Court also emphasized that at voir dire, "the court asked the defendants' proposed questions and elicited additional information regarding potential juror bias." [FN30] In rejecting the defendants' assertion that their ability to select an impartial jury had been impaired, the court noted that defense counsel had available an "arsenal of information" about each prospective juror.

FN29. Branch, 91 F.3d at 724 (citations omitted) (emphasis added).

FN30. Branch, 91 F.3d at 725 (citing United States v. Wong, 40 F.3d 1347, 1377 (2nd Cir.1994) (upholding anonymous jury where "extensive" voir dire adequately explored prospective juror bias)).

In United States v. Sanchez, [FN31] the trial court redacted certain identifying juror information because of a 10-day delay between jury selection and the commencement of the evidentiary phase of the trial and the potential fears of jurors in adjudicating the guilt or innocence of a "rogue" police officer. The Fifth Circuit reversed the district court's decision to empanel an anonymous jury, concluding that there was no evidence that the defendant had attempted to interfere with the judicial process or witnesses, and there was no indication that the jurors would be subjected to the type of extensive publicity that might bring about intimidation and harassment. The Court held that the district court's decision must rest on more than "mere allegations or inferences of potential risk." [FN32] Based upon the dearth of evidence supporting use of an anonymous jury in Sanchez, the Fifth
Circuit held that the trial court abused its discretion.

FN31. 74 F.3d 562 (5th Cir.1996).

FN32. Sanchez, 74 F.3d at 564 (citing Krout, 66 F.3d at 1427).

The Fifth Circuit continued its evaluation of the use of anonymous juries in United States v. Salvatore [FN33] which involved seventeen defendants who were indicted for operating a criminal enterprise that subverted the licensing requirements of Louisiana's Video Poker Law, charges similar in nature to those contained in the present indictment. Fourteen of the seventeen defendants pled guilty prior to the trial. The district court empaneled an anonymous jury. The trial court found that Salvatore and the Tusas were closely connected with organized crime. The government also submitted evidence which showed that there was an ongoing investigation into possible jury tampering in connection with one defendant's acquittal of criminal charges in state court. Furthermore, there was evidence indicating that certain defendants showed a "willingness to interfere with the judicial process," [FN34] namely their guilty

pleas to the video poker conspiracy. The Court also found that extensive publicity surrounding the trial "enhanc[ed] the possibility that the jurors' names would have become public." [FN35]

FN33. 110 F.3d 1131 (5th Cir.1997).

FN34. 110 F.3d at 1144.

FN35. 110 F.3d at 1144.

In affirming the trial court's decision to empanel an anonymous jury, the Fifth Circuit reiterated the factors previously set forth in Krout which may be considered by a trial judge. The Fifth Circuit also noted that a "district court may certainly consider evidence other than that relating to these five factors when deciding whether to empanel an anonymous jury, for the decision to do so should be based upon the 'totality of the circumstances.'" [FN36] Two of the defendants who had pled guilty in Salvatore also pled guilty to jury tampering *595 in a prior case. The Fifth Circuit stated that the involvement of these two defendants in the video poker conspiracy "establishes that [the three] appellants participated in a criminal enterprise and conspired with individuals having the capacity and willingness to interfere with the judicial process." [FN37] Thus, a defendant's association with persons who have the capacity or willingness to interfere with the judicial process may be considered by the trial judge in determining whether to empanel an anonymous jury. [FN38] In addition to the fact that the three appellants in Salvatore were connected with organized crime, the Fifth Circuit noted the following upon review: (1) the defendants initially faced potentially long sentences; and (2) "the publicity surrounding the trial was quite extensive, thus enhancing the possibility that the jurors' names would have become public." [FN39]

FN36. Salvatore, 110 F.3d at 1143 (citing Branch, 91 F.3d at 724 (emphasis added)).

FN37. 110 F.3d at 1144.

FN38. Such is the case before the Court. A number of persons have pled guilty to related charges set forth in United States v. Edwards and United States v. Brown. These pleas clearly show an association with persons who have the capacity or willingness to interfere with witnesses or the judicial process.

FN39. Salvatore, 110 F.3d at 1145.

While most of the Fifth Circuit cases in which anonymous juries were approved involved persons associated with organized crime (with the exception of Branch), it is clear that this is not a required factor under the Fifth Circuit jurisprudence. The "organized crime factor" weighs heavily in favor of an anonymous jury, but it is only one of the numerous factors which may be considered based on the "totality of the circumstances" of the case. [FN40] In Branch and Salvatore, the Fifth Circuit discussed the factors enumerated in Krout and stressed that those factors were not the sole matters to be considered by the court in making its decision. In Branch, the Court, noted that "[o]ther circumstances may also justify [the use of an anonymous jury]. Indeed, while evidence that the defendant has in the past or intends in the future to tamper with the jury may be sufficient to warrant an anonymous jury, it is by no means necessary." [FN41] Thus, under Fifth Circuit jurisprudence, the analysis the Court must make in deciding whether to use an anonymous jury is fact intensive and depends upon the particular and total circumstances involved in the case. It is also clear that the use of an anonymous jury satisfies constitutional muster "when needed to ensure against a serious threat to juror safety provided the defendant's interest in the conduct of an effective voir dire of prospective jurors and the presumption of innocence are maintained." [FN42] A lower court's decision to empanel an anonymous jury is entitled to deference and is subject to abuse of discretion of review. [FN43]

FN40. See, Salvatore, 110 F.3d at 1135 (citing United States v. Branch, 91 F.3d 699, 724).

FN41. Branch, 91 F.3d at 724 (citations omitted).

FN42. Riggio, 70 F.3d at 339.

FN43. Krout, 66 F.3d at 1426.

The Court now turns to a review of the evidence which supports the Court's decision to empanel an anonymous jury in this case.

ANALYSIS

[1][2][3][4] It is clear from the Fifth Circuit jurisprudence that a trial court may consider various forms of evidence in deciding whether to empanel an anonymous jury. The list of factors set forth in Krout is not intended to be exhaustive. In fact, a court must look to the totality of the circumstances and may consider additional factors beyond those enumerated in Krout. The courts may receive evidence in camera and/or ex parte. [FN44] A motion for anonymous *596 jury may also be determined by the trial court without any hearing on the matter. [FN45] The evidence presented to the Court in connection with the government's motion for anonymous jury, the testimony and exhibits presented during the course of the trial, matters pertaining to the jury which occurred during the trial, and extensive media attempts to contact the jurors during the trial clearly support the Court's decision to empanel an anonymous jury. There was also a serious concern on the part of some jurors about being identified during voir dire and after the trial. This important factor was considered by the Court and also supports the Court's decision herein. [FN46]

FN44. See, United States v. Paccione, 949 F.2d 1183 (2nd Cir.1991) (court considered affirmations received in camera, ex parte); United States v. Salvatore, 110 F.3d 1131 (5th Cir.1997)

(court considered evidence in camera; ex parte). While the Court did receive from the United States an affidavit which complained of an alleged threat signed by Sid Moreland, the Court did not consider this information about an alleged threat in making its decision. During the trial, the Court ordered the United States to give a copy of the Moreland affidavit to the defendants while Moreland was testifying.

FN45. Krout, 66 F.3d at 1420 (no hearing held and the court relied upon unsworn affidavits); United States v. Edmond, 52 F.3d 1080 (D.C.Cir.1995) (sua sponte and without a hearing); United States v. Eufrasio, 935 F.2d 553 (3rd Cir.1991) (hearing not required as a matter of law, though it is a better practice to record findings and reasons when empaneling anonymous juries); United States v. Wilson, 160 F.3d 732 (D.C.Cir.1998) (evidentiary hearing was unnecessary where court relied upon the charges in the indictment and prosecutor's affidavit).

FN46. See, Rec.Doc. No. 1350 (Minute Entry which indicated nine of the eleven jurors did not want to be contacted by the press).

A review of this evidence is in order.

A number of factors weigh in favor of an anonymous jury in this case. First, the nature of the charges brought against Edwin and Stephen Edwards in this case and the nature of the charges brought against Edwin Edwards and others in United States v. Brown are indicative of attempts by Edwin Edwards and Stephen Edwards and others associated with them to interfere with the judicial process or witnesses. Edwin Edwards and Stephen Edwards are charged in Count 33 of the superseding indictment in this case with illegal wiretapping and counter surveillance of an FBI agent. [FN47] A co-defendant, Dempsey White, has already pled guilty to a crime relating to the allegations set forth in Count 33. [FN48] The other charges set forth in this indictment also show a pattern to disregard the judicial and

administrative process established by the State of Louisiana for the proper selection of licenses to operate gaming riverboats in Louisiana. [FN49]

FN47. This charge was severed with the consent of all parties.

FN48. Dempsey White plead guilty to the offense of misprision of a felony relative to his failure to reveal the existence of these criminal acts to the authorities.

FN49. A number of persons plead guilty to these charges and testified at the trial.

In the indictment returned against Edwin Edwards in United States v. James Harvey Brown, et al., Edwin Edwards is charged with tampering with a witness pursuant to 18 U.S.C. s 1512(b)(3). [FN50] Judge Edith Brown Clement recently granted the government's motion for an anonymous jury in that case. [FN51]

FN50. The Court recused itself in the Brown case for reasons unrelated to this case. See Rec.Doc. Nos. 254, 261 (Cr-99-151). When ruling on the pending anonymous jury motion, the Court was not required to make credibility determinations of any potential witnesses in the Brown case. As noted elsewhere in this opinion, the Court is not required to look beyond the allegations of certain facts that, if true, would justify the impanelment of an anonymous jury. Even if the Court excludes the allegations against Edwin Edwards which are set forth in the indictment in Brown, an anonymous jury would still be warranted under the facts of this case. While the defendants have filed a motion to recuse this Court in this case because of its recusal in Brown, neither the law nor the evidence in this case requires recusal. See Rec.Doc. No. 1489.

FN51. Rec.Doc. No. 270 (Cr-99-151)

Both the government and the defendants submitted evidence pertaining to matters involving jury selection and possible jury tampering in two earlier criminal *597 trials involving Edwin Edwards in the Eastern District of Louisiana in the 1980s. There are numerous affidavits presented from the current and former Commandants of the Louisiana State Police, attorneys in the former cases and others who may have been involved in the jury selection process. This Court does not believe it is necessary for the Court to determine with certainty whether all of the events which were alleged in these affidavits actually occurred. The potential for these events to have interfered with the judicial process is sufficient evidence for the Court to take into consideration, together with the other evidence in this case. Indeed, there was very credible evidence presented in the form of affidavits which suggest that the methods used to select jurors in the earlier cases had the potential to affect the judicial process in the earlier case.

The evidence presented during the course of the current trial also established that Andrew Martin had the potential for interfering with the judicial process. In a taped conversation which occurred in Edwin Edwards' office on January 9, 1997, Andrew Martin states that he has obtained a transcript of a wiretap from a "friend of a friend." [FN52] The transcript of this conversation, [FN53] which was played to the jury in connection with the Treasure Chest scheme provides:

FN52. This tape and the corresponding transcript were introduced in connection with the Treasure Chest scheme. Andrew Martin was found guilty on charges related to this scheme.

FN53. Designated by the government during trial as transcript number 110.

[AM--Andrew Martin
EWE--Edwin W. Edwards]

AM: (UI). (Greetings in French)
EWE: (UI) what you got there?
(Rustling noises heard)
AM: You uh, see this? It's on the transcript of the wire tap for, from LARRY.
EWE: From LARRY?
AM: Yeah.
EWE: The whole thing?
AM: No. You want the whole thing?
EWE: Anything about you in here?
AM: No. Uh huh.
EWE: Huh?
AM: Uhn huh.
EWE: Anything about me?
AM: No. Have the DEQ guy KUARSKI (ph) in there. (Pause) I don't need it. You can have it if you want to. I'll let you have it but I'd like to get it back if I can. If you uh you wanna read it.
(Pause in conversation)
AM: As long as you're not in there you don't care uhh Chief. (Chuckles). But some of the stuff it said, LARRY really, you Know ...
EWE: Come on strong.
AM: (Sighs). I'll tell you what you know, some of that, some of that stuff he, language he said was, uh, was something else.
(Pause)
EWE: A lot of loose tongues in here.
AM: So you really don't realize after you read one of these things what they can do, what they can't do.
(Pause)
EWE: Where did you get this?
AM: Friend of a friend of a friend.
(Chuckles)
(Pause)
AM: You want it you can have it. I really don't need it.
EWE: Huh?
AM: I really don't need it. You can have it if you want it.
EWE: I'll take it and I'll read it just for the hell of it

It is also appropriate to consider crimes charged in an indictment when determining *598 use of an anonymous jury. [FN54] The crimes charged in the indictment in this case clearly suggest attempts to corrupt the legal system of selecting licenses under the laws and regulations of the State of Louisiana pertaining to riverboat gaming licenses. These matters may also be considered against all of the defendants. The allegations become even more relevant when the Court considers the number of persons associated with the defendants who have plead guilty to charges related to the indictment returned in this case.

FN54. See, Riggio, 70 F.3d at 336 (defendant accused of jury tampering in a previous case).

In United States v. Salvatore, [FN55] the Fifth Circuit affirmed the trial court's consideration of a "current" investigation of jury tampering on the part of a co-defendant and consideration of the appellants' alleged involvement in a video poker conspiracy with two co-defendants who pleaded guilty to the conspiracy prior to empaneling an anonymous jury. The Fifth Circuit stated that these considerations established that the "appellants participated in a criminal enterprise and conspired with individuals having the capacity and willingness to interfere with the judicial process." [FN56] The same situation is presented in the present case with regard to Edwin Edwards, Stephen Edwards and Andrew Martin and their co-conspirators. In Salvatore, the Fifth Circuit said it was proper for the trial court to consider an ongoing investigation into possible jury tampering on the part of a co-defendant in support of using an anonymous jury. The evidence is even stronger in the present case. Here, an investigation resulted in two indictments being returned against Edwin Edwards for allegedly trying to engage in illegal wire tapping, witness tampering and engaging in the other conduct alleged in the indictment in this case and in United States v. Brown. In addition, co-defendants and other persons have entered guilty pleas to charges related to those in the two cases.

In addition, Stephen Edwards was charged with similar conduct in this case and a taped conversation revealed Andrew Martin's ability to obtain a transcript of a wiretap conversation that he was not entitled to have regarding an ongoing investigation. These allegations taken together with the allegations set forth in the affidavits pertaining to jury selection utilized by Edwin Edwards in the two Edwin Edwards trials conducted in the Eastern District of Louisiana clearly show that these defendants have the capacity, ability and willingness to interfere with the judicial process and witnesses.

FN55. 110 F.3d at 1131.

FN56. 110 F.3d at 1144.

In United States v. Riggio, the Fifth Circuit approved the trial court's consideration of facts indicating that the defendant "had been accused of jury tampering in a previous case" in support of empaneling an anonymous jury. [FN57] Thus, in the Fifth Circuit, a court may consider charges lodged outside of the pending criminal case in determining whether an anonymous jury is warranted. The Court in Riggio also held that evidence adduced at trial may be considered by the appellate court in determining the propriety of the trial court's decision. [FN58]

FN57. 70 F.3d at 338.

FN58. See, Krout, 66 F.3d at 1427 (citing United States v. Wong, 40 F.3d 1347, 1376-77 (2nd Cir.1994)). This is particularly important in this case. As will be seen later in this opinion, the Court's concern about media coverage proved to be a valid concern. Furthermore, the tapes played during the trial also confirmed conclusions reached by the Court when it made the decision to empanel the jury and withhold the names, addresses and places of employment of the jurors.

As noted earlier in this opinion, it is appropriate for the Court to consider the nature of the crimes charged in the indictment. [FN59] The defendants in the present case were accused of being part of a broad-based conspiracy to interfere with *599 the lawful process established by the State of Louisiana for issuance of gaming licenses to operate riverboats in Louisiana. [FN60] All of the defendants except Ecotry Fuller [FN61] were charged as members of a criminal enterprise, the objective of which was to manipulate the lawful licensing process for riverboats in order to enrich themselves and their associates and family members. These allegations support the Court's finding that the defendants had a propensity or willingness to interfere with the lawful state licensing process. The fact that the jury found all of the defendants except Tarver and Fuller guilty of some of these charges only confirms the concern the Court had at the beginning of the trial about the defendants' ability and willingness to interfere with the licensing process.

FN59. Riggio, 70 F.3d at 340.

FN60. Rec.Doc. No. 311 at 3 (Amended Joint Proposed Summary of Indictment) (emphasis supplied).

FN61. Ecotry Fuller and Greg Tarver were acquitted by the jury.

In determining whether to empanel an anonymous jury, the Fifth Circuit has held that the court may also consider the potential that, if convicted, the defendants face lengthy incarceration and substantial monetary penalties. Such is the case pending before the Court. Under the indictment, the defendants were faced with the following maximum sentence of imprisonment and monetary fines and forfeiture: (1) Edwin Edwards: 350 years of imprisonment, a fine of $7,250,000.00, or both; the Court could also impose restitution and/or a forfeiture in the amount of $3,129,000.00; (2) Stephen Edwards: 300 years of imprisonment, a fine of $500,000.00, or both; the Court could

also impose a restitution and/or forfeiture in the amount of $3,129,000.00; (3) Cecil Brown: 80 years of imprisonment, a fine of $1,000,000.00, or both; the Court could also impose a restitution and/or forfeiture in the amount of $2,425,000.00; (4) Andrew Martin: 120 years of imprisonment, a fine of $1,750,000.00, or both; the Court could also impose a restitution and/or forfeiture in the amount of $2,425,000.00; (5) Bobby Johnson: 75 years of imprisonment, a fine of $2,250,000.00, or both; (6) Gregory Tarver: 55 years of imprisonment, a fine of $2,750,000.00, or both; and (7) Ecotry Fuller: 60 years of imprisonment, a fine of $3,000,000.00, or both.

Thus, each defendant at the time the Court issued its original opinion faced substantial terms of imprisonment and staggering penalties and forfeitures. All but two of the defendants continue to face lengthy jail sentences, fines and forfeitures following the jury's verdict. The fact that some defendants were acquitted of all charges and other defendants were found not guilty on some counts does not change the analysis. In Salvatore, the Fifth Circuit held that the relevant inquiry is whether the defendants are initially facing potentially lengthy prison sentences and monumental financial penalties. [FN62]

FN62. 110 F.3d at 1144.

The publicity and the emotional, political climate surrounding the trial are additional factors which the Court may and did consider in determining whether to empanel an anonymous jury. The Fifth Circuit acknowledged the existence of the extensive news coverage in its opinion affirming the Court's gag order in U.S. v. Brown. [FN63] Extensive publicity of these proceedings enhance the possibility that jurors' names would become public, thereby exposing them to possible intimidation and harassment. [FN64] This case has received extensive media coverage before, during and after the trial. This Court entered two standing orders pertaining to media coverage, reserved seating, credentials, a "bull pen" for interviews and reserved parking for media *600

trucks on a closed lane of a public street. [FN65] This Court has outlined in other opinions the extensive procedures the Court was required to put in place to accommodate the numerous local and national media representatives who wanted to attend and cover the trial. The record also reflects the numerous motions filed by the press before, during and after trial seeking the names, addresses and places of employment of jurors. The media has also sought to obtain the juror questionnaires, all in camera hearings pertaining to jurors, and the entire sealed record. Courts have recognized that "[a] trial judge is usually well-aware of the ambience surrounding a criminal trial and the potential for juror apprehensions." [FN66] The Court's decision to withhold juror identifying information " 'requires a trial court to make a sensitive appraisal of the climate surrounding a trial and a prediction as to the potential security or publicity problems that may arise during the proceedings.' " [FN67] The trial judge's assessment is given due deference by the appellate court. The evidence in this case not only reflects the Court's apprehension and concern, but the concern and apprehension of some jurors about being identified publicly.

FN63. See U.S. v. James Harvey Brown, 218 F.3d 415, 427 (5th Cir.2000).

FN64. Salvatore, 110 F.3d at 1143.

FN65. Rec.Doc. Nos. 47 and 292.

FN66. United States v. Eufrasio, 935 F.2d 553, 574 (3rd Cir.1991).

FN67. Branch, 91 F.3d at 723 (citing United States v. Childress, 58 F.3d 693, 702 (D.C.Cir.1995)).

Some background regarding the parties is appropriate and necessary for a full understanding of the facts surrounding media coverage and the emotional, political climate that existed herein.

One of the defendants is Edwin Edwards, a four-term Governor of the State of Louisiana. It is easy to conclude that Edwin Edwards is a powerful, influential figure in Louisiana's political history. As a result, he is and has been the subject of intense media coverage during his political career. The current indictments only increased the media's interest in Edwin Edwards.

In 1985 and 1986, Edwin Edwards was tried in the Eastern District of Louisiana on charges relating to interfering with the lawful process of licensing for nursing homes. The first trial ended in a hung jury. The former governor was acquitted of all charges during the second trial. Both of these trials received national media attention. The indictment in this case and in Brown have also been the subject of intensive media and public interest as indicated by the news clippings set forth in the appendix.

Also named as a defendant in this case is the former governor's son, Stephen Edwards, who has also been the subject of extensive media coverage. Three of the former governor's associates, Andrew Martin, Bobby Johnson and Cecil Brown, are also included in the indictment. Finally, a powerful state senator and a member of the state gaming board were named as defendants. The potential witness list included Eddie DeBartolo, the former president of the San Francisco 49'ers professional football team and Super Bowl champions, and Cleo Fields, a former congressman and current state senator. Witnesses such as these increased the already extensive media attention and pre-trial coverage. This interest increased even more during the trial when Eddie DeBartolo and other members of his staff testified and during the playing of the video tape of a meeting between Senator Fields and Edwin Edwards. Indeed, the media interest continues today and there are now pending before the Court numerous media motions and requests seeking to copy the audio and video tapes played to the jury as well as other evidence, exhibits and pleadings. The media also filed a

mandamus action against the Court in the Fifth Circuit on July 13, 2000 seeking this and other information. [FN68]

FN68. 5th Circuit Docket # 00-30702.

*601 This trial was expected to last three months, but actually took longer because of illnesses of the parties and jurors and other factors. The trial began on January 10, 2000 and a verdict was returned on May 9, 2000. The media coverage was and is as extensive as the Court thought it would be at the time the Court granted the government's motion. "The prospect of intense publicity militates in favor of jury anonymity to prevent exposure of the jurors to intimidation or harassment." [FN69]

FN69. Wong, 40 F.3d at 1377 (citation omitted).

During voir dire, many members of the jury panel expressed concerns about being identified. Many of the jurors who were picked to serve on the jury expressed similar concerns. After the jury returned its verdict, nine of the eleven members of the trial jury [FN70] requested the Court to advise the media that they did not wish to be contacted. [FN71] However, this is only the beginning and not the ending of the story regarding the media coverage of the jurors. When rendering its opinion granting the government's motion to empanel an anonymous jury, the Court was concerned about juror apprehension, intimidation and harassment by the media and other persons who were not even directly involved in the case, but who had strong feelings for or against parties and the charges.

FN70. One juror was excused during deliberations. Under Rule 23 of the Federal Rules of Criminal Procedure, the jury was allowed to continue its deliberations with eleven jurors.

FN71. Rec.Doc. No. 1350.

In addition to concerns about the media coverage, other events involving third parties and their contacts with the jurors or allegations which occurred during the trial support the Court's decision herein. Despite the anonymity ordered by the Court, the media, upon learning the name of one juror, published the juror's name in the newspaper. [FN72] It seems highly likely that if the jurors were not given anonymity, there would have been widespread dissemination of their names, addresses and places of employment, thereby subjecting them to possible harassment or intimidation from the media and others. Indeed, this very thing happened during the trial as will be discussed later. The Court can only wonder what additional problems the Court and the jurors would have had if the names, addresses and places of employment of the jurors were made public. Following are a few examples of the problems the Court faced despite the numerous precautions taken by the Court.

FN72. The juror's name was known because he was employed as a reporter by that newspaper.

For the convenience and protection of the jurors, the jurors reported to a location away from the courthouse where United States Marshals picked up the jurors and transported them to and from the courthouse each day. This procedure did not deter the press from attempting to locate where the jurors were parking their cars or from attempting to identify jurors presumably by obtaining their identity from license plate numbers on the jurors' cars. Some members of the media discovered the location where the jurors met and attempted to video tape and talk to some of the jurors. After the jury's verdict on the guilt and innocence phase of the trial, but prior to the final verdict on the issue of forfeiture and their discharge as jurors, some members of the media appeared at the homes of jurors to interview jurors presumably about their verdict.

During the voir dire, each juror was questioned individually in open court with the parties, public and media present.

Newspaper articles were published about the answers given by the jurors. These detailed answers caused some jurors to be identified by co-workers, friends and others even though their names and places of employment were withheld from the parties, media and public. Jurors were also required to give their opinions about Edwin Edwards and the other defendants, *602 gambling, wiretaps, use of informants, plea bargains and people who dealt in large sums of cash. It was important for this jury to be able to express honest opinions about these and other questions without being concerned about harassment or other contact from the media or any other person. There was little, if anything the Court could do to prevent certain stories from being published. For example, although sealed to protect their identity, a list of 61 unindicted co-conspirators was published and widely disseminated by the media. [FN73] The Court's gag order did not seem to deter the press from seeking interviews of the defendants, attorneys or witnesses. This is not a criticism of the media's desire and right to cover this case in accordance with the rights guaranteed to the press under the Constitution and jurisprudence. It is, however, justification for trying to protect the identity of the jurors and free them from being questioned, harassed or otherwise bothered and intimidated during and after this lengthy trial.

FN73. The Court has been unable to determine how and from whom the reporter obtained this sealed document.

The Court also believed it was important to shield the jurors from improper contact, harassment and possible influence from the general public and others. A cursory review of the answers given by the prospective jurors to questions set forth in the juror questionnaire reveals a good sample of the public's feelings about the parties and charges brought against the defendants. The emotional, political atmosphere that surrounded this case could not be avoided. No juror serving in a case where there is such high public interest as this case should have to be concerned about being contacted, influenced or harassed by the general

public or anyone else. The Court concedes that not every case where there is extensive media interest justifies or requires an anonymous jury. But when, as in this case, a totality of the facts suggest the potential that the jurors will be exposed to intense media coverage that could lead to possible intimidation and harassment, an anonymous jury is necessary.

Despite the best efforts of the Court and the United States Marshal's Service, some individuals did attempt to cause problems for some jurors because of personal bias against a juror, personal relationships with the parties and other reasons. This caused the Court to conduct several hearings which required the jurors and in some cases, their families, to be questioned by the Court. The Court believes that the use of the anonymous jury prevented more of this type of conduct. The Court's decision to withhold the jurors' identities allowed the jury to concentrate on the evidence and proved to be a substantial deterrent to intentional or accidental contact and influence on the jury. This protection also lessened the prejudice which could arise from such actions, innocent though they may appear. The Court's action also ensured all of the parties a fair and impartial trial.

The Court cannot overlook the emotional, political atmosphere that surrounded this case. As noted earlier, Edwin W. Edwards was a four-term governor of Louisiana. A state senator and a member of the state gaming board were also named as defendants. Witnesses included a mayor, chairman of the gaming board and members of the former governor's staff. The potential witness list included many current and former political appointees and state employees. To "minimize the prejudicial effects of the pretrial publicity surrounding this trial and an emotional, political atmosphere that created a risk of jury intimidation and improper influence," [FN74] the Court withheld the names, addresses and places of employment of the jurors. The Court does not believe there were any other alternatives under the totality *603 of the facts in this case. The

Sixth Circuit upheld similar action taken by the trial judge in U.S. v. Dakota, [FN75] The totality of the facts of this case create a similar, if not greater need for the Court's action than those set forth in Dakota.

FN74. United States v. Dakota, 188 F.3d 663, 668 (6th Cir.1999).

FN75. 188 F.3d at 663.

Certain defendants have argued that because the government's evidence in support of an anonymous jury did not pertain to all of the defendants, [FN76] it would be unfair and prejudicial to require an anonymous jury for all of the defendants. This argument is without merit. The defendants are incorrect in their assessment of the evidence and the jurisprudence which the Court followed in reaching its decision. Furthermore, defendants' argument was rejected in United States v. Ross. [FN77] In Ross, the Eleventh Circuit stated that "[e]ven though the government did not prove that these incidents were related to Appellant or another co-conspirator, the court nevertheless properly considered them in establishing an anonymous jury." [FN78] What the defendants fail to acknowledge is the fact that six of the seven defendants in this case are charged as members of a criminal enterprise to manipulate the lawful state licensing process in order to enrich themselves and others via extortionate activities. Some of the alleged objectives of the enterprise include actions of the defendants: (1) to enrich the members of the enterprise as well as their associates, friends, families, and partners, through the illegal manipulation and corruption of the lawful system to award riverboat gaming licenses, in order to ensure that licenses would be awarded to those applicants supported by the enterprise; (2) to enrich the members of the enterprise [and related others] by extorting payments from riverboat license applicants, thus manipulating the lawful licensing process; (3) to enrich the members of the enterprise [and related others] by ensuring that the gaming operations

benefitting Edwin Edwards and the members of the enterprise would not be economically harmed or otherwise affected by adverse political action; (4) to secretly divide and launder the proceeds of the enterprise's racketeering activity; (5) to implement any means deemed necessary, including using, endeavoring to use, and procuring other persons to use illegal electronic wiretaps to intercept telephone communications of government agents and prosecutors, in order to corruptly formulate defenses and countermeasures to the government's investigation of the enterprise. [FN79] It is clear that the Court may consider the evidence pertaining to one co-conspirator against the other co-conspirators and members of the criminal enterprise when deciding whether to empanel an anonymous jury.

FN76. There is evidence relating directly to defendants Edwin Edwards, Stephen Edwards and Andrew Martin. There is also evidence related directly to persons associated with the defendants in this case.

FN77. 33 F.3d 1507 (11th Cir.1994).

FN78. 33 F.3d at 1521 n. 25 (citation omitted).

FN79. Rec.Doc. No. 306, pp. 8-10.

While Ecotry Fuller is not alleged to have been a member of the aforementioned criminal enterprise, he was charged in this case with perjury before a federal grand jury regarding his statements about the executive summary. The allegation that Mr. Fuller made false statements to a grand jury while under oath is indicative of a willingness to subvert the lawful judicial process.

It is also obvious that neither Gregory Tarver nor Ecotry Fuller were prejudiced by the Court's decision to grant the government's motion. Both were found not guilty on all charges brought against them. Furthermore, not guilty verdicts were returned on

other charges and racketeering acts brought against some of the other defendants. It is clear that the jury gave very careful consideration to all of the evidence brought against each defendant and based their verdicts on the evidence *604 and not the fact that their names had not been disclosed. There was never any indication or suggestion made to the jury by the Court or any attorney involved in the case that the defendants were violent or dangerous. The Court's charge mentioned elsewhere in this opinion dispelled any suggestion that names of jurors were withheld because the defendants might physically harm the jurors or their families. The fact that numbers instead of names were used by the jurors did not prejudice the defendants or interfere with the jury's ability to fairly and impartially render a proper verdict herein. [FN80]

FN80. This is particularly so given the substantial information given to parties about the jurors.

Judge Edith Brown Clement's decision in United States v. Carollo [FN81] supports the Court's decision to empanel an anonymous jury even when some of the evidence presented in support thereof does not directly relate to every defendant. After Judge Clement determined that the jury in Carollo would be anonymous, a number of the defendants moved for separate trials. These defendants argued that they would be unfairly prejudiced by the "decision because the jury will assume that all of the defendants are dangerous, whereas in reality the Court's decision to empanel an anonymous jury was based on the histories of only a few defendants." [FN82] The Court refused to grant separate trials, finding that the prejudice feared by the defendants could be cured by limiting instructions to the jury. This Court gave similar limiting instructions to the jury. Because of the verdicts rendered by the jury, it is obvious that the jury not only followed these instructions, but actually returned not guilty verdicts on all charges brought against two of the parties who were complaining of prejudice. The jury also found Edwin W. Edwards and Stephen Edwards not guilty on some

charges and racketeering acts. It is apparent that the jury followed the Court's limiting instructions on why numbers were used instead of names.

FN81. No. 94-158, 1995 WL 591322 at *2 (E.D.La. Aug.28, 1995) (not reported in F.Supp.) (court empaneled an anonymous jury where the backgrounds of some of the defendants necessitated it, while the backgrounds of others did not).

FN82. 1995 WL 591322 at *1.

[5] There is a consensus among all circuits that have considered the anonymous jury issue that once the decision to empanel an anonymous jury is made, the trial court must take appropriate action to ensure the parties are given adequate voir dire to allow the parties to have sufficient information to meaningfully exercise their challenges. The focus of the inquiry is whether the defendants were prejudiced in selecting an impartial jury because relevant and meaningful information was withheld from them. A common sense reading of the jurisprudence indicates that the mere disclosure of the name of a person is not particularly enlightening insofar as gleaning information about the biases, beliefs, prejudices and values of that person. As the record will reveal, the parties were provided with extensive information about each juror. There were only three things the parties did not know: the juror's name, specific address and specific place of employment. However, the parties did know in which parish and what zip code each juror currently lived and a history of prior places where the juror lived. The parties were also provided with extensive information about the juror's current and prior employment history. This information provided to the parties will be discussed in detail later in this opinion and it is also indicated on the juror questionnaire which is attached as an exhibit in the appendix of this opinion. Numerous courts have upheld a trial court's decision to empanel an anonymous jury when extensive voir dire and answers to questionnaires are provided. The thrust of the inquiry is whether

"measures are taken to inform a defendant of jury *605 demographics and to permit ample voir dire," [FN83] so that a defendant's right to intelligently exercise peremptory challenges is not impaired. In United States v. Branch, [FN84] the Fifth Circuit held that there was no showing that refusing to release the names and addresses of the jury prejudiced the defendants' ability to select an impartial jury. [FN85] The defendants in Branch were furnished with answers to 80 detailed questions submitted to prospective jurors. [FN86]

FN83. Eufrasio, 935 F.2d at 574 (citing Scarfo, 850 F.2d at 1015).

FN84. 91 F.3d at 699.

FN85. 91 F.3d at 724.

FN86. See also, Eufrasio, 935 F.2d at 574 (anonymous jury is justified as long as defendants are afforded full voir dire); Paccione, 949 F.2d at 1192 (when anonymous jury is warranted, the defendant's fundamental right to an unbiased jury is adequately protected by the court's conduct of a voir dire designed to uncover bias as to issues in the cases and as to the defendant himself); United States v. Edmond, 52 F.3d 1080, 1082 (D.C.Cir.1995) (voir dire was more than adequate to compensate for the information denied by juror anonymity; it elicited information about the prospective jurors' habits, activities, work experiences, and families that was far more extensive and detailed than appellants might have drawn from jurors' mere names and addresses); Wong, 40 F.3d at 1377 (despite withholding of jurors' names, addresses, and employers, the court questioned prospective jurors about their familiarity with the case, the defendants and the crime scenes, and inquired about their neighborhoods, marital status, employment, spouse's and children's employment, education, organizational affiliations, ethnicity, military service, and other matters; this "extensive voir dire adequately explored prospective jurors' bias" as to issues in

the case and as to the defendants and "was more than sufficient to enable the defendants to exercise their challenges meaningfully, and to obtain a fair and impartial jury."); United States v. Crockett, 979 F.2d 1204 (7th Cir.1992) (names, addresses, and places of employment withheld, but district court conducted a "searching and thorough" voir dire).

[6] In the present case, the parties were provided with an "arsenal of information" based upon the extensive questionnaires completed by potential jurors, as well as the Court's individual voir dire of potential jurors. Specifically, the parties were provided with answers to 116 detailed questions submitted to prospective jurors. [FN87] The final questionnaire utilized by the Court was compiled from questions submitted jointly by the parties. Copies of the completed questionnaires prepared by the 125 jurors who were summonsed for the trial were given to the parties several days prior to jury selection. This allowed the parties ample time to review the completed questionnaires. [FN88] The government and the defendants also submitted follow-up questions they wished the Court to ask during individual voir dire. But for the name, address and place of employment, the parties were provided with a wealth of information as to each potential juror. This included information about the age, race, medical problems, economic and other hardships, residential history, [FN89] family history and marital status, number of children, current employment status, occupation, nature of the employer's business, length of employment, size of company where the juror worked, prior jobs, training and employment for federal, state or local governments, training in business, financial or accounting, prior business investments and whether the juror's employer ever did business with the state. The questionnaire also provided information regarding the juror's education, military experience and background information regarding the juror's spouse or partner. The jurors also provided information about their activities, including volunteer work, involvement in education, religious, professional, *606 political, or other union groups, and any

leadership positions held. Jurors were required to disclose their political party affiliation and whether they considered themselves liberal, conservative, moderate or some other status. The jurors disclosed whether they or any member of their family had run, been elected or appointed to public office, had contributed to or made gifts to political candidates or campaigns or worked in such campaigns. In addition to the above, the questionnaire required each juror to state how closely they followed Louisiana politics. Jurors set forth their religion, how often they attended church and whether there were any religious beliefs which prevented them from serving as a juror. Questions 57- 71 asked jurors detailed information about gambling in Louisiana, religious beliefs regarding gambling and other knowledge about gambling laws, regulations, corruption in awarding riverboat licenses, any responsibility Edwin Edwards may have had for problems in the state gaming industry and opinions about people who deal in large sums of cash. Detailed questions were asked each juror about their prior jury service and their opinions of the court system. [FN90] Included in the questions about the court system were questions seeking the juror's opinions about plea agreements, use of informants, immunity and reduced sentences.

FN87. A copy of the questionnaire is attached hereto.

FN88. Because Edwin Edwards was hospitalized during jury selection, the parties had additional time to study the completed questionnaires.

FN89. This included information whether the juror owned or rented a home or lived with others and how long and where in Louisiana the juror lived.

FN90. Questions 72-85.

There were extensive questions directed to the jurors regarding any connections they had with the parties, attorneys and agents in this case. Questions were also asked about the media and

pretrial publicity, opinions of jurors on the guilt or innocence of the defendants, the defendants' presumption of innocence and right to remain silent, the government's burden of proof beyond a reasonable doubt and the juror's obligation to follow the law as given by the judge. Finally, questions were asked of each juror whether they could serve in a fair and impartial manner. As will be noted later, jurors were then individually questioned during voir dire about the answers they gave in the questionnaire.

The Court summoned 125 jurors to appear on the first day of the trial. The Court began the voir dire by asking questions to the entire jury panel in a group after the jurors had been placed under oath. Then individual voir dire was conducted on each juror outside the presence of the other jurors. The parties were allowed to exhaust every appropriate question relevant to this case either via the written questionnaire and by suggesting questions during the voir dire process. The transcript of voir dire will consist of approximately 2,000 pages. [FN91] The Court took eight days to actually empanel the jury. After all questions were asked of the jurors, the Court allowed the parties considerable time to again review the questionnaires and the answers given by the jurors during voir dire before requiring the parties to exercise their challenges. A review of the answers given during voir dire and the answers to the juror questionnaires reveals the parties had more than ample information to use in deciding which jurors to select, challenge for cause or peremptorily strike. In short, the information provided to the United States and the defendants was far more extensive and detailed than the parties could have obtained by just knowing the name, address and place of employment of a juror. The information obtained from the questionnaire and the voir dire adequately explained any bias or prejudice a juror may have had against a defendant, the government, and on the issues involved in the case. This information permitted the parties, including the defendants, to meaningfully exercise their challenges and to obtain a fair, honest and impartial jury. The defendants' fundamental right to an unbiased jury was adequately protected

by the *607 procedure used by the Court and the information provided by each juror.

FN91. Only 80 jurors were questioned individually before the Court obtained a sufficient pool to select the jury.

[7] This Court was cognizant of the defendants' constitutional rights to a presumption of innocence until proven guilty beyond a reasonable doubt. The Court was also aware that a neutral, plausible and nonprejudicial reason for anonymity must be provided to the jurors. Depending upon the particular case, these instructions should ordinarily include some of the following: (1) defendants are entitled to a presumption of innocence; (2) the case is one of high profile; (3) the jurors are to remain anonymous because of the publicity surrounding the case and the need to shield jurors from the possibility of extrajudicial communications; [FN92] (4) use of an anonymous jury ensures that there will be a fair trial for both sides; [FN93] (5) empaneling an anonymous jury in no way suggests that improper communications have been made by either side; [FN94] and (6) it is common practice in many cases in federal court to keep the names and identities of the jurors in confidence. [FN95]

FN92. United States v. DeLuca, 137 F.3d 24, 32 (1st Cir.1998).

FN93. Salvatore, 110 F.3d at 1144.

FN94. Salvatore, 110 F.3d at 1144.

FN95. Edmond, 52 F.3d at 1093.

The jurors in the present case were provided with neutral, nonprejudicial reasons for the Court's decision in order to protect the defendants' constitutional right to a fair trial. The Court gave the following instruction to the jury:

You have been randomly selected to serve as a potential juror in the trial of United States versus Edwin W. Edwards, Stephen Edwards, Bobby Johnson, Andrew Martin, Cecil Brown, Gregory Tarver and Ecotry Fuller.

This case has attracted a high degree of publicity. To protect your privacy during the jury selection process and trial, you have been assigned an individual juror number which will be used to identify you. You must use your juror number at all times. This procedure has been followed in other highly publicized cases in federal court and is designed to protect the privacy of jurors during the course of the trial.

With any potentially high profile case, we are all subject to receiving phone calls and letters about the case and even inquiries from members of the media or from friends, neighbors or relatives. I want to ensure that there not be any such contact with members of the jury during the course of this trial. I also want to protect the defendants as well as the government from any belief on the part of the jury that any such communications are coming from one side or the other. In other words, I do not want the defendants or the government to be characterized as anyone who would be sending communications to the jury or as someone who is trying to improperly influence the jury.

The use of these procedures is to ensure that both sides will get a fair trial. It will also permit you the jury to perform your important duties without your privacy being invaded.

You are also to remember that the defendants have entered not guilty pleas to the charges brought against them. Therefore, they are presumed innocent unless and until the government proves their guilt beyond a reasonable doubt. Therefore, as we proceed today and throughout the remaining days of this trial, you should only use your juror number to identify yourself. Do not use your or your spouse's name, home or business address or the name or address of your employers in responding to questions or otherwise communicating with the Court.

Are there any members of the jury who would have any bias, prejudice or negative feelings toward the United States or the defendants because of the *608 Court's decision not to reveal

your names to the public?

All jurors assured the Court that they had no bias, prejudice or negative feelings toward the United States or the defendants because of the use of an anonymous jury. In addition to giving the quoted charge, the Court set forth the following language in the first questionnaire submitted to the prospective jurors:

This case has attracted a high degree of publicity. To protect your privacy during the jury selection process and trial, you have been assigned an individual juror number which will be used to identify you. Your juror number is located in the top right-hand corner of the first page of the attached juror questionnaire and on each page thereafter. The procedure used in this case has been followed in highly publicized cases and is designed to protect the privacy of jurors during the course of the trial.

Defendants argue that empaneling an anonymous jury in this case effectively establishes a new category of cases appropriate for that procedure. The Court disagrees. As noted earlier in this opinion, the Fifth Circuit in United States v. Branch [FN96] upheld impalement of an anonymous jury despite the fact that the defendants had no "ties to organized crime." After carefully considering the totality of the circumstances in this case, the Court concludes that empaneling an anonymous jury was necessary to protect the lawful administration of justice, ensure all parties a fair and impartial trial, protect the privacy of the jurors and protect the jurors from undue harassment, intimidation, and inquiries.

FN96. See, Branch, 91 F.3d 699.

This is not the first case where a court has empaneled an anonymous jury where the defendants had no ties to organized crime. In United States v. Branch, [FN97] United States v. Talley [FN98] and United States v. Dakota [FN99] the appellate court affirmed the impalement of an anonymous jury even though links to organized crime were absent. In fact, if there

was a specific requirement that organized crime be present before the courts can approve an anonymous jury, the appellate courts would have clearly stated such. The Branch decision has been previously cited and discussed herein. In United States v. Talley, there was no evidence of any involvement by the defendant in a "criminal organization that included a pattern of violence," nor was there evidence that Talley had ever attempted to tamper with any previous juries. [FN100] There was evidence, however, of Talley's dangerous propensities to do so.

The Court also believed that Talley's "many years of law enforcement experience provided him with the types of contacts that would enable him to tamper with the jury." [FN101] In the present case, it is clear that Edwin Edwards' sixteen years of service as Governor of Louisiana have provided him with similar kinds of contacts. [FN102] This fact is borne out by the affidavits submitted in conjunction with the anonymous jury issue regarding the manner in which the juries were selected during the 1985 and 1986 trials of Edwin *609 Edwards. [FN103] It appears that co- workers or fellow union members of potential jurors were contacted. [FN104] According to the affidavits, the jury selection and research process was "organized and efficient" and involved more than 100 close supporters of the former governor. Political operatives contacted friends, neighbors and co- workers of potential jurors. Research on the jurors continued during the course of the trial. There is some indication that a sheriff and some of his associates may have assisted in the jury selection process. [FN105] Additionally, FBI Agent Hultz interviewed Colonel Paul Fontenot, who was the primary trooper in charge of guarding Edwin Edwards during the 1985 and 1986 trials. According to Agent Hultz, Colonel Fontenot, who was later named Commandant of the Louisiana State Police by Edwin Edwards, stated that during the previous trials, he was requested by members of Edwin Edwards' staff to perform records and license plate checks on various persons. Colonel Fontenot further stated that since the 1985 and 1986 trials, Stephen Edwards has requested him to perform background checks on various persons.

FN97. 91 F.3d at 699.

FN98. 164 F.3d 989 (6th Cir.1999).

FN99. 188 F.3d 663 (6th Cir.1999).

FN100. 164 F.3d 989, 1002. (6th Cir.1999)

FN101. 164 F.3d at 1002.

FN102. The court in Talley further found that the defendant's current charge of attempting to kill an F.B.I. agent in his case snd a witness indicated that he had "already attempted to affect the judicial process." Although Mr. Edwards is not charged with attempting to kill an F.B.I. agent, he is charged with illegal wiretapping and counter surveillance of an F.B.I. agent in this case--evidence that he attempted to tamper with the lawful judicial process. He is also charged in United States v. Brown with tampering with a witness and bribing a judge.

FN103. Rec.Doc. No. 1446.

FN104. Rec.Doc. No. 975.

FN105. Rec.Doc. No. 1449.

The statements contained in the affidavits submitted by all of the parties indicate the extensive resources which were and are available to Edwin Edwards to obtain information about jurors. It is also clear that during the prior trials, the defense team continued to receive information about the sitting jurors during the course of the trials. The defendants submitted some clarifying affidavits from some of the same persons from whom the FBI took statements. It is not necessary for the Court to resolve this conflict in the affidavits to a certainty. This evidence when combined with the other evidence considered by the Court strongly supports the Court's decision to withhold the

names, addresses and places of employment of the jurors.

This Court can understand the need for gathering information about potential jurors in accordance with the local rules of court and the Federal Rules of Criminal Procedure to assist counsel in the selection of the jurors. However, once the trial jurors are seated, continuing research of the jurors creates the potential for prejudicial communications, innocent or otherwise, with a juror or a friend, family member or co-worker of a juror. Such contacts, though innocent in nature, can unduly influence a juror's decision. It is precisely this kind of communication, contact or influence which the Court in this case wished to avoid.

CONCLUSION

It is important to note that the Court did not just rely on the affidavits submitted with the motion to support its decision to withhold the name, address and place of employment from the parties, media and public. The Court also considered: (1) the nature of the charges pending in this case and in Brown; (2) the defendants' past attempts to interfere with the judicial process or witnesses; (3) the potential lengthy jail sentences and substantial monetary penalties the defendants were facing, if convicted; (4) the extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation, influence and harassment; (5) the potential and actual contact by the media and other individuals with members of the jury panel while the trial was being held; (6) the emotional, political atmosphere of this case; (7) juror apprehension about being identified or interviewed; and (8) the totality of the circumstances in this case.

The Court believes that empaneling an anonymous jury was the only manner in which the Court could ensure that the jurors in this case were protected from outside influence and intimidation from *610 persons associated with the government, the defendants, the media, and individuals who had an interest for or

against any of the parties or the jurors in this case.

The totality of all of the circumstances in this case establish a clear and actual need to withhold the names, addresses and places of employment of the jurors. The evidence which supports the Court's decision was clear at the time the Court made its initial decision to withhold the names, addresses and places of employment from the parties. The evidence presented at the trial, the media's actions and other events which occurred during and after the trial established an absolute need for a "partially anonymous jury" in this case.

The answers given by the jurors to the questionnaire and to questions asked during the voir dire gave the parties more than sufficient information for the parties to make an informed decision on which jurors to accept, challenge for cause or peremptorily challenge.

The jury was properly instructed by the Court why their names, addresses and places of employment were withheld. Finally, the jury's verdict shows these parties were not prejudiced because numbers instead of names were used by the jurors.

For these reasons, the motion of the United States for an anonymous jury is and was GRANTED.

APPENDIX A

Juror No. _____

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA
CHIEF JUDGE FRANK J. POLOZOLA

UNITED STATES OF AMERICA
CRIMINAL ACTION
VERUS NUMBER
98-165-B-M2
EDWIN W. EDWARDS, STEPHEN EDWARDS
CECIL BROWN, ANDREW MARTIN,
GREGORY TARVER, BOBBY JOHNSON,
ECOTRY FULLER

JUROR QUESTIONNAIRE

In order to speed up the process of jury selection, a juror questionnaire has been prepared for you to complete. These questions should be answered byyou and returned to the Clerk of the United States District Court for the Middle District of Louisiana in the enclosed envelope. A response is required by December 17, 1999. Do not place your name, address or place of employment anywhere on this questionnaire. Your name, address or place of employment should only be placed on the cover sheet attached to the questionnaire. Please place your signature on the cover sheet. Your answers will have the effect of a statement made under oath.

The questionnaire is designed to obtain information about your background as it relates to your possible service as a juror in this case. Its use will avoid the necessity of asking each prospective juror every one of these questions in open court, thereby substantially shortening the jury selection process.

All information contained in this questionnaire will be kept confidential. It will be reviewed only by the Court and by the

attorneys on each side. Neither your identities nor your answers will be released to the general public or the media. You will be identified at trial only by your juror number.

Respond to each question as fully and completely as possible. Your complete candor and honesty is necessary so that both the prosecution and the defense will have a meaningful opportunity to select an appropriate jury. Your cooperation is of vital importance.

Because the questionnaire is part of the jury selection process, the questionnaires are to be answered under your oath as a prospective juror to tell the truth. You are instructed not to discuss this case or the questionnaire with anyone, including your family, friends, co-workers and fellow jurors. You must complete the questionnaire yourself without consulting, talking to or seeking assistance from anyone.

If you require additional space for your response or wish to make further comments regarding any of your answers, please use the additional blank pages attached to the back of your questionnaire. Please identify by number the question you are responding to on the blank page.

Please keep in mind that there are no "right" or "wrong" answers. Your answers will assist the Court and the parties in selecting an appropriate jury.

Please fill out the entire questionnaire. Do not leave any questions blank. If you are unable to answer a question or do not understand the question, please answer "do not know" or "do not understand" in the space after the question.

PLEASE WRITE OR PRINT LEGIBLY. IF YOUR ANSWERS ARE ILLEGIBLE, YOU WILL BE REQUIRED TO RE-COPY YOUR ANSWERS.

Thank you for your full cooperation. It is of vital importance to the Court that you return your completed questionnaire by DECEMBER 17, 1999.

1. Age: _____

2. Gender: _____Male _____Female

3. What is your race?
   ____ White
   ____ Hispanic/Latino
   ____ Black/African-American
   ____ Asian
   ____ Native American
   Other:_____

4. Do you have any difficulty reading, speaking, or understanding the English language?
   Yes ____ No ____

5. Do you speak or understand any languages in addition to English?
   ____ Yes What language(s):_____
   ____ No

6. Do you have:

Any difficulty hearing	Yes ____ No ____
Any difficulty seeing	Yes ____ No ____
Primary responsibility for a young child, a disabled or elderly relative	Yes ____ No ____
Regular doctor's appointments for a chronic health problem	Yes ____ No ____

IF YES, please briefly explain: _____

7. Are you taking any medication on a regular basis? Yes ____ No ____

IF YES, which ones: _____

Please answer the following questions even if the Court has previously denied your request to be excused for hardship reasons. The Court will reconsider any request to be excused for hardship reasons.

8. The Court estimates that the trial of this case may last 2-3 months. Do you have any personal problems or medical condition(s) which could affect your ability to serve as a juror in a trial of this length?

Yes ____ No ____

IF YES, please state the nature of the problem(s): _____

_____

_____

9. Jury service is one of the highest duties and privileges of a citizen of the United States. Mere inconvenience or the usual financial hardships of jury service will be insufficient to excuse a prospective juror. Jurors are paid $40.00 per day plus mileage expenses. Do you wish to apply to the Court to be excused on the ground that jury service would be a serious hardship?

Yes ____ No ____

IF YES, please briefly explain the hardship: _____

_____

_____

10. Is there anything else of a personal or professional nature that might make it difficult for you to concentrate on this trial?

Yes ____ No ____

IF YES, please explain: _____

Residential History

11. City of residence: _____ Zip Code: _____

12. Do you: (check one)
____ Own your home
____ Rent your home
____ Live with other homeowners
____ Live with relatives, if so state relationship:_____

13. How long have you lived in Louisiana? _____ years
Where else have you lived in Louisiana, and how long did you live there?

_____

_____

14. Please list the places outside Louisiana where you have lived and how long
you have lived there:

_____

_____

15. Where were you born? _____

Background/Family History

In answering questions 16-31 do not give the name or address of any employer or employer's business. If a question asks about an occupation, only provide a general description about the nature of that occupation. (For example: construction, A/C, plumbing, government, etc.)

16. Marital status: (check one)
____ Single (never married)
____ Living with a partner for ____ years
____ Married for ____ years
____ Separated for ____ years; married for ____ years

____ Divorced for ____ years; married for ____ years
____ Widowed for ____ years; married for ____ years

17. If you have children, stepchildren or grandchildren, please list: (do NOT list names)

Relationship	Age	Education	Occupation	Does he/she live with you?

Employment

18. Current employment status (check any and all that apply):
____ Self-employed
____ Work full-time
____ Work part-time
____ Homemaker for ____ years
____ Student for ____ years
____ Disabled and unable to work for ___ years or ____ months
____ Unemployed/laid off for ____ years or ____ months
____ Retired for ____ years
____ Other: _____

19. What is or was your occupation? (If you are retired, unemployed, homemaker, or disabled, what was your last job?) Do NOT list name of employer or name of employer's business.
_____

20. What are (were) your main responsibilities on your most recent job?

_____

_____

_____

21. Please state the nature of your current or last employer's business (e.g. construction, A/C, plumbing, government, etc.) Do NOT list name of employer or name of employer's business.

_____

22. Length of employment at current or last job: ____ (years) (months)

23. Do you work for a:

____ Small company (Less than 50 employees)
____ Large company (50 employees or more)
____ Self-employed Company name: _____
____ Government agency--Specify: _____
____ Other: _____

24. How satisfied are you with your current work situation?

____ Very satisfied
____ Somewhat satisfied
____ Somewhat dissatisfied
____ Very dissatisfied
____ Not working

25. Have you ever been laid off? Yes ____ No ____
IF YES, please explain: _____

_____

26. Do you supervise other people? Yes ____ No ____
If yes, how many? _____
Did you hire/fire others? Yes ____ No ____

Describe your responsibilities: _____

_____

27. Whether or not you are currently employed, please complete the following information for previous jobs and employers: (Do NOT include current job and Do NOT list name of employer or name of employer's business.)

Job Title or Kind of Work Length

_____

_____

_____

_____

28. Have you or anyone in your family ever had training or employment in the following:

Federal government	Yes ____ No ____
Internal Revenue Service	Yes ____ No ____
State government or legislature	Yes ____ No ____
Local government	Yes ____ No ____
Law enforcement (local, state, or federal)	Yes ____ No ____
Court system (local, state, or federal)	Yes ____ No ____
Law or law office	Yes ____ No ____
Gaming industry	Yes ____ No ____

IF YES TO ANY OF THE ABOVE, please explain whether this is yourself or a relative, courses or job(s) held, and dates of employment: D

_____

_____

_____

29. Have you taken any courses or had training in business, finance, or accounting?

Yes ____ No ____

Please explain: _____

30. Have you ever owned or invested in a business?

Yes ____ No ____

a. Are you still operating the business?

Yes ____ No ____

IF NO, why not? _____

_____

b. Please describe the business but do not give the name:

_____

_____

c. Was this experience: (check one) ____ positive ____ negative ____ mixed

Please explain: _____

_____

31. Have you or your employer ever done business or sought to do business with any state government agency?

Yes ____ No ____

IF YES, please explain: _____

_____

_____

a. Were you or your employer treated fairly by the state agency?

Yes ____ No ____

b. Was this experience: (check one) __ positive __ negative ____ mixed

Please explain: _____

_____

Education

32. What is the highest grade or degree you completed in school? _____

If more than high school, please fill in below:

Dates Area(s) of study/training Degree/Certificate

_____

_____

33. When you were in school, what was your:

Favorite Subject Least Favorite Subject

_____ _____

_____ _____

Military

34. Have you ever been in the military?

Yes ____ No ____

IF YES, which branch? What was your rank and dates of service, and what type of discharge did you receive?

_____

_____

If you served in the military, please describe the types of jobs you had, any special training, including law enforcement or military courts, and the types of skills you acquired.

_____

_____

Your Spouse or Partner's Background

Please complete all of the following questions regarding your present spouse or non-married partner. If you are widowed, divorced, or separated, please complete all the following questions regarding your former spouse or partner.

35. What is your spouse's or partner's age? _____

36. Spouse or partner's current employment status (check any and all that apply):

____ Self-employed
____ Work full-time
____ Work part-time
____ Homemaker for _____ years
____ Student for ____ years
____ Disabled and unable to work for ____ years or _____ months
____ Unemployed for years _____ or months _____
____ Retired for _____ years
____ Other: _____

37. What is or was your spouse or partner's occupation? (If he/she is retired, unemployed, homemaker, or disabled, what was their last job?) Do NOT list name of employer or name of employer's business.

_____

38. What are (or were) your spouse or partner's duties and responsibilities:

_____
_____

39. List the nature of your spouse or partner's current or last employer(s)' business (e.g., construction, plumbing, government, etc.). Do NOT list name of employer or name of employer's business.

_____

_____

40. Length of spouse/partner's employment at current or last job: _____ years

41. What other types of work has he/she done? _____

_____

_____

42. Was your spouse/partner ever laid off? Yes ____ No ____

IF YES, please explain: _____

_____

43. What is the last grade or degree your spouse or partner completed in school?

_____

If more than high school, please fill in below:

Dates Area(s) of study/training Degree/Certificate

_____

_____

Activities

44. Have you ever done any volunteer work?

Yes ____ No ____

IF YES, please describe: _____

_____

45. Have you or your family been involved in any organizations, such as

educational, religious, professional or political groups?

Yes ____ No ____

IF YES, please explain: _____

_____

46. Have you or has your spouse/partner ever belonged to a union?

Yes ____ No ____

IF YES, who: Self _____ Spouse/Partner _____

Dates of Membership: Self ___ to __ Spouse/Partner ___ to ___

47. Have you ever held a leadership position in any organization?

Yes ____ No ____

IF YES, please list the leadership positions you have held: _____

_____

48. In terms of political party affiliation, are you a:

____ Democrat
____ Republican
____ Independent
____ Libertarian
____ Other: _____
____ None

49. Do you consider yourself to be politically:

____ Extremely Liberal
____ Liberal
____ Moderate
____ Conservative
____ Extremely Conservative
____ None of the above

50. Have you, or anyone close to you, ever run for, been appointed or been elected to serve in any public office or governing board, such as a school board or police jury?

Yes ____ No ____

IF YES, please explain: _____

_____

51. Have you ever given a gift to a public official or contributed money or made a loan to a political candidate or campaign?

Yes ____ No ____

IF YES, please explain: _____

_____

52. Have you ever worked in the field of politics or donated your time to work on the campaign of a political candidate?

Yes ____ No ____

IF YES, please explain: _____

_____

53. How closely would you say you follow Louisiana state politics?

____ Follow very closely
____ Follow somewhat closely
____ Follow rarely
____ Do not follow at all

54. What is your religion?

____ No preference
____ Baptist
____ Protestant
____ Catholic
____ Jewish
____ Other: _____

55. Approximately how often do you attend church or religious services?

____ Never
____ Rarely
____ Several times a year
____ Once a month
____ Several times a month
____ Once a week
____ Several times a week

56. Is there anything in your religion or personal beliefs which would prevent you from sitting as a juror, in judgment of the guilt or innocence of another person, or following the law given to you by the Court?

Yes ____ No ____

Gambling

57. How do you feel generally about legalized gambling in Louisiana?

____ Approve
____ Disapprove
____ No opinion

58. Does your church or religious organization have a position on gambling?

____ Yes, it is against gambling.
____ Yes, it is not against gambling.

____ No, my church has no opinion on gambling.
____ Don't know.
____ Not applicable.
IF YES, do you agree with your church's position?
Yes ____ No ____

59. Do you have any moral or personal opposition to legalized gambling?

Yes ____ No ____

IF YES, please explain: _____
_____

60. Do or did you support the campaign to reform or repeal the state gaming laws?

Yes ____ No ____

61. Are you specifically opposed to any of the following:

Riverboat gambling	Yes ____ No ____
Casino gambling	Yes ____ No ____
Video poker	Yes ____ No ____

62. Have you or has anyone close to you ever had an interest in or investment with any companies or person involved in the ownership of gaming operations?

Yes ____ No ____

IF YES, please describe: _____
_____

63. Do you know anyone who has had any contact with the Louisiana State Police Riverboat Gaming Division?

Yes ____ No ____

IF YES, please explain: _____
_____
_____

64. Do you know anyone who now works or has worked in the gaming industry?

Yes ____ No ____

IF YES, please explain in what job(s), when, and where he/she is employed:

_____

_____

65. Have you read, seen, or heard any news reports regarding regulation of the gaming industry in Louisiana?

Yes ____ No ____

IF YES, what have you read, seen, or heard? _____

_____

66. Do you believe that the citizens of Louisiana should have more influence over how gambling is regulated in the state?

____ Agree strongly
____ Agree somewhat
____ Disagree somewhat
____ Disagree strongly
____ No opinion

67. Do you believe that a person who is connected with the gaming industry is more likely to violate the law than one who is not connected with the legalized gambling industry?

____ Agree strongly
____ Agree somewhat
____ Disagree somewhat
____ Disagree strongly
____ No opinion

68. Do you believe that the gaming industry is necessary to Louisiana's economy?

____ Agree strongly
____ Agree somewhat
____ Disagree somewhat
____ Disagree strongly

____ No opinion

69. Do you believe there has been corruption in the awarding of Louisiana riverboat gaming licenses?

____ Agree strongly
____ Agree somewhat
____ Disagree somewhat
____ Disagree strongly
____ No opinion

70. Do you believe former Governor Edwards is responsible for previous or current problems in the state's gaming industry?

____ Agree strongly
____ Agree somewhat
____ Disagree somewhat
____ Disagree strongly
____ No opinion

71. Do you believe that anyone who deals in large sums of cash is probably engaged in criminal activity?

____ Agree strongly
____ Agree somewhat
____ Disagree somewhat
____ Disagree strongly
____ No opinion

Jury Service/Experience and Opinions about the Court System

72. Have you ever served on a jury? Yes ____ No ____

IF YES, please complete the following for each case on which you served:

Civil or Criminal	Charges or Issues	Was a verdict reached? If	Was a verdict Unanimous?	Were you the Foreperson?

Criminal Allegations When Where If no, why not? Verdict Foreperson?

_____

_____

73. Do you believe everyone should be treated equally under the law?

____ Agree strongly
____ Agree somewhat
____ Disagree somewhat
____ Disagree strongly

74. Do you believe the police are very thorough and accurate in their usual investigations?

____ Agree strongly
____ Agree somewhat
____ Disagree somewhat
____ Disagree strongly

75. Have you or your family been the victim of wrongdoing by others (whether or not criminal charges were filed)?

Yes ____ No ____

IF YES, please describe: _____

_____

_____

76. Have you ever testified as a witness in a trial?

Yes ____ No ____

Please explain: _____

_____

77. Have you or has a family member ever been involved in a lawsuit or legal action of any kind?

Yes ____ No ____

Please explain: _____

_____

78. Have you ever accused someone or been accused of dishonest practices or activities?

Yes ____ No ____

IF YES, please explain: _____

_____

_____

79. Do you know anyone (including an employer) who has been charged or

convicted of a crime or been involved in a criminal investigation?

Yes ____ No ____

IF YES, please explain: _____

_____

_____

80. Have you or anyone close to you ever been treated unfairly by any branch

of government?

Yes ____ No ____

IF YES, please identify the government agency and explain what happened.

_____

_____

81. Have you or has a close family member or friend ever served time in jail

or prison?

Yes ____ No ____

a. Please explain who, when, how long, and the nature of the

charge(s):

_____

_____

_____

b. Did you or that person apply for a pardon?

Yes ____ No ____

Please explain who applied, when, and the outcome:

_____

82. Do you know anyone who agreed to cooperate with the prosecution in a criminal case in order to get a reduced sentence or immunity?

Yes ____ No ____

IF YES, please explain: _____

_____

83. Some of the government's witnesses in this case are testifying as part of plea bargaining agreements or under a grant of immunity from prosecution. What is your opinion about the use of plea agreements or granting immunity for this purpose?

____ Approve

____ Disapprove

____ No opinion

Please explain your answer: _____

_____

84. What is your opinion regarding law enforcement's use of Court authorized telephone wire taps in conducting an investigation?

____ Approve

____ Disapprove

____ No opinion

Please explain your answer: _____

_____

85. What is your opinion regarding law enforcement's use of informants in gathering information relating to possible criminal violations of the law?

____ Approve

____ Disapprove

____ No opinion
Please explain your answer: _____
_____

Connections with Parties to this Case

86. Do you or does anyone close to you know or have any connection with any of the prosecutors in the case: Eddie Jordan, Jr., Jim Letten, Michael Magner, Peter Strasser, Fred Harper, or Todd Greenberg?

Yes ____ No ____

IF YES, what is the connection and whom is it between? _____
_____
_____

87. Have you or has anyone close to you had any contact with Judge Polozola or his staff?

Yes ____ No ____

IF YES, please explain: _____
_____

88. Do you know anyone who is or was associated with any of the United States Attorney's offices in Louisiana, the U.S. Department of Justice, or the F.B.I.?

Yes ____ No ____

IF YES, what was the association and what is your relationship?
_____
_____
_____

89. Do you or does anyone close to you know of or have any connection with any of the following defense lawyers: Dan Small, Jim Cole, Pat Fanning, Sonny Garcia, Mary Olive Pierson, Hillar Moore, Rebecca Hudsmith, Craig Smith, William Jeffress, James Heavner, Ernest Johnson?

Yes ____ No ____

IF YES, what is the connection and whom is it between? _____

_____

_____

90. Do you or does anyone close to you know or have any connection with any of the defendants in this case: former Governor Edwin Edwards, Stephen Edwards, Cecil Brown, Senator Greg Tarver, Andrew Martin, Bobby Johnson or Ecotry Fuller?

Yes ____ No ____

IF YES, what is the connection and whom is it between? _____

_____

_____

91. Former Governor Edwin Edwards was previously tried and found not guilty of federal charges in 1986 in a separate case. Would your opinion of the verdict (in the prior case) make it difficult for you to sit as a fair and impartial juror in this case?

Yes ____ No ____ Not sure ____

IF YES OR NOT SURE, please explain: _____

_____

92. Would your current opinion about former Governor Edwards make it difficult for you to be a fair and impartial juror in this case?

Yes ____ No ____ Not sure ____

93. Do you think former state officials (no longer in office) should be allowed to provide services to companies doing business with, or regulated by, the state?

Yes ____ No ____

94. Do you think that a current state official's family members should be allowed to provide services to companies doing business with or regulated by the state?

Yes ____ No ____

Media

95. Do you read a daily newspaper?

Yes ____ No ____

Which one(s)? _____

96. What other magazines and newspapers do you read on a regular basis?

_____

97. What radio and television programs do you enjoy?

TV: _____

Radio: _____

98. Have you followed news accounts of any trials in the news?

Yes ____ No ____

IF YES, please explain: _____

_____

99. Do you or have you ever had a bumper sticker on your car?

Yes ____ No ____

IF YES, what does or did it say? _____

_____

Pretrial Publicity

Because this case has received publicity, you have probably seen, read, or heard something about this case either in the media or from friends, relatives, or co-workers. It is important that you carefully and completely answer the following questions concerning what you have learned about the case. There are no right or wrong answers. Please be as candid as possible.

100. a. Briefly tell what information you have read, seen, or heard about the case, the defendants, or their attorneys:

_____
_____
_____
_____
_____
_____

b. What have you read, seen, or heard about the government's investigation, the federal prosecutors, or government witnesses?

_____
_____
_____
_____
_____
_____

101. From which source(s) have you heard, read, or seen anything about this
case? (Check any and all that apply)

____ TV news
____ Radio
____ Newspapers
____ Magazines
____ Internet
____ Word of mouth
Other: _____

102. Approximately how many media (television, newspaper, magazine, and radio) reports in total have you seen, read, or heard about this case?

____ None
____ 1 - 5
____ 6 - 10

____ 11 - 20
____ 21 - 30
____ 31 - 50
____ 51 - 75
____ 75 - 100
____ 101 - 200
____ More than 200

103. Have you heard others express opinions about this case or about any of the defendants?

Yes ____ No ____

IF YES, what opinions were expressed? _____

_____

_____

_____

104. Have you personally met or do you have any knowledge of anyone associated with this case?

Yes ____ No ____

IF YES, please list who they are and how you know them: _____

_____

_____

105. Have you formed any opinion about the case or about any of the defendants?

Yes ____ No ____

IF YES, (a) what is your opinion? _____

_____

_____

(b) would you be able to set aside your current opinion and base your verdict on the law and evidence in this case? _____

_____

106. Every defendant is presumed innocent and cannot be convicted unless the jury, based solely on all the evidence in this case, unanimously decides that his guilt has been proven beyond a reasonable doubt. The burden of proving guilt rests entirely with the government. The defendants have no burden of proof at all. Would you have any difficulty following these rules?

Yes ____ No ____

107. If, as a juror, you determine that the government has proven a defendant guilty of a charged offense beyond a reasonable doubt, would you be able to vote in favor of a guilty verdict?

Yes ____ No ____

108. Conversely, if, as a juror, you believe that the government has failed to carry its burden of proving a defendant guilty of a charged offense beyond a reasonable doubt, would you be able to vote for a verdict of not guilty?

Yes ____ No ____

109. Do you believe that a defendant in a criminal trial should be required to

testify?

____ Agree

____ Disagree

IF AGREE: the judge will instruct you that:

a. a defendant in a criminal trial has no obligation to testify;

b. jurors cannot draw any conclusion from the fact that a defendant chooses not to testify; and

c. that the fact that a defendant chooses not to testify cannot be a factor in reaching your verdict.

Would you have any problem following those instructions if a defendant chooses not to testify?

Yes ____ No ____

IF YES, please explain: _____

_____

110. Would you be more likely to believe a law enforcement officer or other government agent than any other witness?

Yes ____ No ____ Treat all the same ____

111. You as a juror must follow the law as given to you by the Judge whether you agree with it or not. Would you have any difficulty following this rule?

Yes ____ No ____

112. The indictment in this case is an accusation and not evidence of guilt. Would you have any difficulty treating the indictment as an accusation and not as evidence of guilt?

Yes ____ No ____

113. There are seven defendants in this case. Each defendant and each charge must be considered separately. You cannot find a defendant guilty on any count unless the government has proven his guilt on that count beyond a reasonable doubt. You must not draw any conclusion from the fact that the defendants are on trial together, and you must not find one defendant guilty by reason of your finding another defendant guilty. Would you have difficulty following these rules?

Yes ____ No ____

114. Do you know of any reason why you could not fairly and impartially decide in accordance with your oath and based solely on the law and evidence, whether the government has proved a defendant's guilt beyond a reasonable doubt?

Yes ____ No ____

IF YES, what is the reason? _____

_____

_____

Conclusion

115. Is there any matter not covered by this questionnaire that you think the attorneys or court might want to know about when considering you as a juror in this case?

Yes ____ No ____

Please explain: _____

_____

_____

_____

116. Is there any matter not covered by this questionnaire that may affect your ability to reach a fair and impartial verdict?

Yes ____ No ____

IF YES, please explain: _____

_____

_____

_____

_____

*624 119 F.Supp.2d 589

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124 F.Supp.2d 387
(Cite as: 124 F.Supp.2d 387)

United States District Court,
M.D. Louisiana.
UNITED STATES of America
v.
Edwin EDWARDS, et al.
No. CR. 98-165-B-M2.
Aug. 22, 2000.

In prosecution based on alleged conspiracies involving extortion, bribery and public corruption, defendants filed various pre-trial, trial and post trial motions seeking to suppress results of wire, oral, video and electronic surveillance and to suppress evidence obtained as a result of searches conducted pursuant to a search of their homes, offices and/or safe deposit boxes. The District Court, Polozola, Chief Judge, held that: (1) defendants failed to make the requisite substantial preliminary showing for Franks hearing on truthfulness of the affidavits submitted by the government to support its request for a surveillance order; (2) sufficient probable cause was present to support order authorizing interception of wire communications on telephones located at both defendant's residence and his place of business; (3) application for wiretap order met necessity requirement; (4) sufficient information was presented to justify extensions of wiretap order; (5) order authorizing electronic surveillance of defendant at his law office was supported by probable cause; and (6) sufficient nexus existed between defendants' residences and offices and items sought in search warrants to support warrants authorizing search of defendants' residences and offices, and certain safe deposit boxes.

Motions denied.

West Headnotes

[1] Searches and Seizures k199
349k199

Defendants failed to make the requisite substantial preliminary showing for Franks hearing on truthfulness of the affidavits submitted by the government to support its request for a surveillance order; even if there were alleged errors or omissions in the affidavits, those alleged errors or omissions did not negate the probable cause which existed in the affidavits.

[2] Telecommunications k530
372k530

A judge's decision to issue a wiretap order based on his determination that probable cause exists is entitled to great deference.
18 U.S.C.A. s 2518.

[3] Telecommunications k515
372k515

Fact that a confidential witness may be involved in criminal conduct does not disqualify that witness' statements from being considered by court in determining whether probable cause exists for issuance of wiretap order. 18 U.S.C.A. s 2518.

[4] Telecommunications k515
372k515

Sufficient probable cause was present to support order authorizing interception of wire communications on telephones located at both defendant's residence and his place of business; confidential witness' statements implicating defendant in criminal activity were independently corroborated by other credible evidence including consensual recordings made at the

direction of FBI and a piece of paper which detailed illegal monetary payments which had been requested by defendant. 18 U.S.C.A. s 2518.

[5] Searches and Seizures k199
349k199

A defendant is not entitled to an Franks hearing on a motion to suppress unless there are allegations that amount to a substantial preliminary showing of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof.

[6] Telecommunications k516
372k516

Government need not prove exhaustion of every conceivable option before a wiretap order may issue. 18 U.S.C.A. s 2518(1)(c), (3)(c).

[7] Telecommunications k516
372k516

Application for order authorizing interception of wire communications on telephones located at both defendant's residence and his place of business met necessity requirement; affidavit stated that normal investigative techniques were either tried, used or unlikely to succeed in gathering enough evidence to prosecute the suspected activity, and affidavit also gave a detailed account of
the investigative techniques used by the agents. 18 U.S.C.A. s 2518(1)(c), (3)(c).

[8] Telecommunications k519.1
372k519.1

Affidavits, supplemented by logs, tapes and progress reports, provided more than adequate information for the issuing judge to rely on in determining whether to extend wiretap order, and sufficient information was presented to judge for him to conclude there was evidence of criminal activity to justify multiple extensions of his initial order.

[9] Telecommunications k515
372k515

[9] Telecommunications k519.1
372k519.1

Judge did not act in an arbitrary manner when he initially issued and subsequently extended his surveillance order authorizing electronic surveillance of defendant's home; affidavit submitted by FBI agent referred to telephone conversations between defendant and codefendant which establish probable cause to believe defendant was a participant in and had knowledge of codefendant's illegal scheme, and there were sufficient calls made during initial thirty-day period and during subsequent periods which established criminal activity with respect to various illegal schemes. 18 U.S.C.A. § 2518.

[10] Telecommunications k515
372k515

There was sufficient probable cause to believe that defendant's law office had been, was, and would continue to be used for criminal activity, and therefore order authorizing electronic surveillance of defendant at his law office was proper. 18 U.S.C.A. § 2518.

[11] Telecommunications k514.1
372k514.1

Each Title III electronic surveillance application must include a "particular description" of the location where the government proposes to intercept communications; however, application is not required to disclose the exact location of where devices will be placed. 18 U.S.C.A. § 2518(1).

[12] Telecommunications k520
372k520

Order authorizing interception of communications at office building authorized interception of communications in the personal office of defendant as well as codefendant; application procedure, including the attachments provided to judge supported conclusion that judge understood the design of the office building and intended to authorize surveillance in the entire office building, and describing the building as the "law office of [codefendant]" was sufficiently particular to satisfy Title III requirements. 18 U.S.C.A. § 2518(1).

[13] Searches and Seizures k113.1
349k113.1

Mere fact that there is probable cause to believe that a person committed a crime does not in and of itself constitute probable cause to search his residence or office for evidence of that crime; a nexus must exist between the residence or office and the items sought in the search warrant.

[14] Searches and Seizures k114
349k114

Sufficient nexus existed between the defendants' residences and offices and business records, bank account statements, phone records and currency sought in search warrants to support

warrants authorizing search of defendants' residences and offices, and certain safe deposit boxes; based upon the ongoing extortion and bribery allegedly occurring on the part of defendants and other co-conspirators, it was logical to infer that the types of items sought in warrants would be found at places to be searched.

[15] Searches and Seizures k121.1
349k121.1

Fairly long periods of time are allowed to elapse between information and a search warrant in cases where the evidence clearly shows a longstanding, on- going pattern of criminal activity.

*389 James B. Letten, Peter G. Strasser, Department of Justice, U.S. Attorney's Office, New Orleans, Michael William Magner, U.S. Attorney's Office, Thomas L. Watson, Department of Justice, U.S. Attorney's Office, Eddie J. Jordan, Jr., U.S. Attorney's Office, Stephen A. Higginson, U.S. Attorney's Office, New Orleans, for Plaintiff.

Rebecca L. Hudsmith, Federal Public Defenders Office, Lafayette, LA, William H. Jeffers, Jr., James R. Heavner, Jr., Miller, Cassidy, Larroca & Lewin, LLP, Washington, DC, James Michael Small, Law Offices of J. Michael Small, Alexandria, LA, Patrick Fanning, New Orleans, LA, Mary Olive Pierson, Cooper & Pierson, Baton Rouge, LA, Camille F. Gravel, JR., Alexandria, LA, Hillar C. Moore, III, Baton Rouge, LA, Kenneth Craig Smith, Jr., Smith & John, Shreveport, LA, Richard G. Crane, Nashville, TN, Michael S. Fawer, Covington, LA, Daniel I. Small, Butters, Brazilian & Small, LLP, Lewis O. Unglesby, Lewis O. Unglesby, Baton Rouge, LA, James M. Cole, Bryan M. Cole, Bryan Cave LLP, Washington, DC, Karl J. Koch, McGlynn, Glisson & Koch, Baton Rouge, LA, for Defendants.

Edwin Edwards, Baton, Rouge, LA, Pro se.

Stephen Edwards, Baton, Rouge, LA, Pro se.

RULING ON MOTIONS TO SUPPRESS

POLOZOLA, Chief Judge.

This matter is before the Court on various pre-trial, trial and post trial motions filed by the defendants which seek to suppress the results of wire, oral, video and electronic surveillance. Edwin Edwards, Stephen Edwards and Cecil Brown also have filed motions to suppress evidence obtained as a result of searches conducted pursuant to a search of their homes, offices and/or safe deposit boxes. The defendants also sought in pre-trial motions an evidentiary hearing under Franks v. Delaware. [FN1] The defendants renewed their Franks motion and motions to suppress in motions filed during the course of the trial. [FN2] For reasons which follow, these motions are denied.

FN1. 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

FN2. The defendants renewed their Franks motion and motion to suppress in their motion for a new trial. A separate ruling will be made on the defendants' motion for a new trial at a later date.

*390 Introduction

Prior to the trial, the defendants filed the following motions to suppress: (1) motion of all defendants to suppress the fruits of wire, oral and electronic surveillance; [FN3] (2) Stephen Edwards' motion to suppress evidence derived from a tape recorded conversation between Richard Shetler and Stephen Edwards; [FN4] (3) Cecil Brown's motion to suppress fruits of search warrants relative to Brown's office and residence; [FN5] (4) Stephen Edwards' motion to suppress fruits of search warrants relative to his office, residence, and safe deposit box number 5069; [FN6] and (5) Edwin Edwards' motion to suppress fruits of search warrants relative to his office, residence,

and safe deposit box number 2378. [FN7] On November 17, 1999, the Court held oral argument on these motions. Thereafter, the Court denied each of the pre-trial suppression motions. The Court also denied defendants' request for a Franks hearing. During the course of the trial, the defendants filed a renewed motion for a Franks hearing and to suppress evidence. The Court denied each of these motions and now assigns reasons in support of its decisions.

FN3. Rec. Doc. No. 440.

FN4. Rec. Doc. No. 445.

FN5. Rec. Doc. No. 450.

FN6. Rec. Doc. No. 447.

FN7. Rec. Doc. No. 469, replacing Rec. Doc. No. 452.

All defendants seek to suppress all evidence obtained as a result of wire, oral, video and electronic surveillance. The defendants seek relief under Title III, 18 U.S.C. ss 2510-2522 and the Fourth Amendment. Defendants contend:

(1) The wire surveillance of Cecil Brown is based on the uncorroborated story of Pat Graham;
(2) The FBI agents did not inform Judge Donald E. Walter of Pat Graham's dishonesty;
(3) The June 26, 1996 affidavit of Agent Freddie Cleveland lacked probable cause;
(4) Agent Cleveland's affidavit failed to demonstrate necessity as required by Title III;
(5) Since there was improper surveillance of Cecil Brown's telephone, all evidence obtained during the entire course of surveillance must be suppressed;
(6) The surveillance of Edwin Edwards' home was improper because there was no basis to conclude that a wiretap at Edwin

Edwards' home would produce evidence of crimes;
(7) There was no probable cause for repeated extensions of the wiretap order at Edwin Edwards' home;
(8) There was no probable cause to believe that Edwin Edwards' law office had or would be used to commit the crimes alleged;
(9) The affidavit of Agent Geoffrey Santini failed to establish probable cause to conduct surveillance of Edwin Edwards' law office;
(10) The surveillance of Stephen Edwards' office was conducted without court authorization;
(11) There was no probable cause to believe that the law office of Stephen Edwards had been or would be used to commit the crimes alleged.

In response to these motions, the government contends that each of the surveillance orders issued by Judges Donald E. Walter and John V. Parker were based on probable cause. The government further contends the surveillance orders were properly issued pursuant to Title III, 18 U.S.C. ss 2510-2522 and there were no violations of the Fourth Amendment. Finally, the government contends the FBI agents did not intentionally or recklessly mislead or present false information or *391 omit material information to the federal judges who issued the Title III orders.

The defendants Edwin Edwards, Stephen Edwards and Cecil Brown have also filed motions to suppress evidence obtained as a result of search warrants. Edwin Edwards seeks to suppress evidence taken from his home, located at 19228 Troon Court, safe deposit box number 2378 at City National Bank and his law office.

Stephen Edwards seeks to suppress a tape recorded conversation between Richard Shetler and Stephen Edwards, [FN8] and any evidence obtained from a search of his residence, safe deposit box number 5069 located at Regions Bank, and the office located at 4621 Jamestown Avenue.

FN8. The Court has already issued a separate written opinion on this issue. See Rec. Doc. Nos. 770 and 771.

Cecil Brown has also filed a motion to suppress evidence obtained from the search of his residence, Route Box 62, Eunice, Louisiana; Cecil Brown's Building, Brown's Auction Company, Louisiana Consultants, Inc., 1211 East Laurel Street, Eunice, Louisiana; and Kenneth Pitre's law office, 100 Vivian Street, Eunice, Louisiana.

In response to the defendants' motions to suppress the evidence obtained pursuant to these search warrants, the government contends the warrants were based on probable cause and each search was valid and constitutional.

Thus, the Court must determine whether the Title III authorizations issued by Judges Walter and Parker were valid. The Court must also determine the validity of the search warrants issued in this case.

After hearing the arguments and evidence presented in connection with the pre- trial motions to suppress, the Court denied each of the motions. The Court also found that the defendants were not entitled to an evidentiary hearing under Franks.

During the trial, the defendants filed another request for a Franks hearing and renewed their motion to suppress. The Court again finds that there was and is no need for a Franks hearing. The Court also finds defendants' renewed motion to suppress is without merit and should be denied.

The Court will discuss each of the motions and the various contentions of the parties. Each of the parties' contentions was considered by the Court in deciding the motions whether or not specifically discussed herein.

Probable Cause Standard

In Illinois v. Gates, [FN9] the Supreme Court adopted a "totality of the circumstances" analysis for determining whether probable cause exists for the issuance of a search warrant. The Court noted that the probable cause standard is a "practical, nontechnical conception." [FN10] Indeed, the Gates Court stated:

FN9. 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).

FN10. Id. at 233, 103 S.Ct. at 2330 (quoting Brinegar v. United States, 338 U.S. 160, 173, 69 S.Ct. 1302, 1311, 93 L.Ed. 1879 (1949)).

> "In dealing with probable cause, ... as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."

* * * * * *

As these comments illustrate, probable cause is a fluid concept-turning on the assessment of probabilities in particular factual contexts-not readily, or even usefully, reduced to a neat set of legal rules.

* * * * * *

As early as Locke v. United States, 11 U.S. 339, 7 Cranch, 339, 348, 3 L.Ed. 364 (1813), Chief Justice Marshall observed, in a closely related context: "[T]he term *392 'probable cause,' according to its usual acceptation, means less than evidence which would justify condemnation.... It imports a seizure made under circumstances which warrant suspicion." ... Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no

place in the magistrate's decision. [FN11]

FN11. Gates, 462 U.S. at 231, 232, 235, 103 S.Ct. at 2328, 2329, 2330 (internal citations omitted).

The standard under which a court is to review a magistrate judge's or district judge's initial determination of probable cause was set forth in Gates as follows:

> Similarly, we have repeatedly said that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review. A magistrate's "determination of probable cause should be paid great deference by reviewing courts." "A grudging or negative attitude by reviewing courts toward warrants[ ]" is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant; "courts should not invalidate warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than a commonsense, manner." [FN12]

FN12. Id. at 236, 103 S.Ct. at 2331 (internal citations omitted).

Although Illinois v. Gates involved the adequacy of a search warrant, the same "totality of the circumstances" test has been applied to determine whether probable cause existed for the authorization of an order permitting the interception of telephone calls and other conversations pursuant to 18 U.S.C. s 2518(3). [FN13] An application for a court-authorized wiretap "must demonstrate probable cause to believe that the target has committed, is committing, or will commit a crime, as well as 'probable cause for belief that particular communications concerning that offense will be obtained through such interception.' " [FN14] Probable cause is evaluated utilizing a

totality of the circumstances test. [FN15]

FN13. United States v. Bankston, 182 F.3d 296, 306 (5th Cir.1999), cert. granted in part by Cleveland v. U.S., 529 U.S. 1017, 120 S.Ct. 1416, 146 L.Ed.2d 309 (Mar. 20, 2000) (No. 99-804) (citing United States v. Dickey, 102 F.3d 157, 162 (5th Cir.1996)). See also United States v. Cherry, 50 F.3d 338, 341 (5th Cir.1995); Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527.

FN14. Bankston, 182 F.3d at 305-306 (citing 18 U.S.C. s 2518(3)(a)-(b)).

FN15. Bankston, 182 F.3d at 306 (citing Dickey, 102 F.3d at 162).

In United States v. Gonzales, [FN16] the Fifth Circuit explained the meaning of probable cause in the context of a wiretap as follows:

FN16. 866 F.2d 781 (5th Cir.1989), cert. denied, 490 U.S. 1093, 109 S.Ct. 2438, 104 L.Ed.2d 994 (1989).

An order authorizing a wiretap, like an ordinary search warrant, must be supported by a finding of probable cause. If the judge uses common sense and bases [a] finding on the entire picture presented [ ], our review is limited. "When this is done [the] determination is conclusive in the absence of arbitrariness." The task of the issuing judge is to make a common sense decision whether the affidavit shows a fair probability that evidence will be obtained, according to all the circumstances, including the veracity and basis of knowledge of anyone supplying hearsay information. [FN17]

FN17. Id. at 786 (quoting United States v. Weinrich, 586 F.2d 481, 487 (5th Cir.1978), cert. denied, 440 U.S. 982, 99 S.Ct. 1792, 60 L.Ed.2d 243 (1979), and cert. denied, 441 U.S. 927, 99

S.Ct. 2041, 60 L.Ed.2d 402 (1979)).

In other words, "[p]robable cause is to be gleaned from a 'common sense reading of the entire affidavit' ...." [FN18]

FN18. United States v. Hyde, 574 F.2d 856, 863 (5th Cir.1978) (quoting Spinelli v. United States, 393 U.S. 410, 415, 89 S.Ct. 584, 588, 21 L.Ed.2d 637 (1969)).

*393 A careful review of the affidavits submitted to Judges Walter and Parker to obtain orders authorizing the use of oral, video and electronic surveillance reveals that they were supported by probable cause. The search warrants issued by these judges for the searches of homes, offices and/or safe deposit boxes of the various defendants were also supported by probable cause. These
conclusions will be discussed in more detail later in this opinion.

The Court now turns to a discussion of whether the Court should have granted the defendants a Franks hearing.

The Standard for a Franks Hearing

The defendants' motion to suppress challenges the truthfulness of the affidavits submitted by the government to support its request for a surveillance order. The defendants contend the affidavits contained intentional and/or reckless false statements or material omissions. The Court believes an analysis of the standards set forth by the Supreme Court in Franks and jurisprudence from the Fifth Circuit and other circuits on this issue is essential to properly decide this issue.

In United States v. Bankston, the Fifth Circuit succinctly summarized the standards the defendants must meet to obtain a Franks hearing as follows:

> In Franks v. Delaware, the Supreme Court held that a defendant is entitled to an evidentiary hearing to contest the validity of a search warrant if he makes a substantial preliminary showing that (1) allegations in a supporting affidavit were a deliberate falsehood or made with a reckless disregard for the truth and (2) the remaining portion of the affidavit is not sufficient to support a finding of probable cause. We have explained that "even if the defendant makes a showing of deliberate falsity or reckless disregard for the truth by law enforcement officers, he is not entitled to a hearing if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause." [FN19]

FN19. 182 F.3d 296, 305 (5th Cir.1999) (quoting United States v. Privette, 947 F.2d 1259, 1261 (5th Cir.1991)) (internal citation omitted).

In United States v. Cleveland, [FN20] Judge Sarah Vance set forth a more detailed discussion and analysis of the Franks standards and the jurisprudence which has ensued following the Franks decision. The Court adopts the following from Judge Vance's very thorough opinion: [FN21]

FN20. 964 F.Supp. 1073 (E.D.La.1997).

FN21. The Fifth Circuit affirmed Judge Vance's opinion. See United States v. Bankston, 182 F.3d 296 (5th Cir.1999), cert. granted in part by Cleveland v. United States, 529 U.S. 1017, 120 S.Ct. 1416, 146 L.Ed.2d 309 (2000).

In Franks, the Supreme Court determined that criminal defendants have a limited right, under the Fourth and Fourteenth

Amendments, to challenge the truthfulness of factual statements made in an affidavit supporting a search warrant, subsequent to the ex parte issuance of the warrant. Franks, 438 U.S. at 155-56, 98 S.Ct. at 2676. Franks ' rule is of "limited scope, both in regard to when exclusion of the seized evidence is mandated, and when a hearing on allegations of misstatements must be accorded." Id. at 167, 98 S.Ct. at 2682.

Under Franks, "[t]here is ... a presumption of validity with respect to the affidavit supporting the search warrant." Id. at 171, 98 S.Ct. at 2684. In order to receive an evidentiary hearing on suppression, a defendant attacking the validity of an affidavit supporting a search warrant must make a "substantial preliminary showing" that: (1) the affiant knowingly and intentionally, or with reckless disregard for the truth, made a false statement in the warrant affidavit and (2) the remaining portion of the affidavit is insufficient to support a finding *394 of probable cause. Id. at 171, 98 S.Ct. at 2684; see also, United States v. Dickey, 102 F.3d 157, 161-62 (5th Cir.1996). The Court spelled out in some detail what it meant by a "substantial preliminary showing:"

To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one

side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. Id. at 171-72, 98 S.Ct. at 2684.

The "substantial preliminary showing" requirement is not lightly met. See United States v. Hiveley, 61 F.3d 1358, 1360 (8th Cir.1995); United States v. Tibolt, 72 F.3d 965, 973 (1st Cir.1995), cert. denied, 518 U.S. 1020, 116 S.Ct. 2554, 135 L.Ed.2d 1073 (1996); United States v. Wajda, 810 F.2d 754, 758 (8th Cir.1987), cert. denied, 481 U.S. 1040, 107 S.Ct. 1981, 95 L.Ed.2d 821 (1987). Furthermore, even if the defendant makes the requisite substantial preliminary showing for an evidentiary hearing, suppression is still not mandated unless the defendant establishes at the hearing, by a preponderance of evidence, that the misstatements in question were made intentionally or with reckless disregard for the truth and that, with the false statement omitted, probable cause was lacking. Franks, 438 U.S. at 156, 98 S.Ct. at 2676.

The Franks holding has been extended to cover alleged omissions in a supporting affidavit, as well as false statements. See United States v. Tomblin, 46 F.3d 1369, 1377 (5th Cir.1995); United States v. Atkin, 107 F.3d 1213, 1216-17 (6th Cir.1997); United States v. Hunter, 86 F.3d 679, 682 (7th Cir.1996), cert. denied, 519 U.S. 985, 117 S.Ct. 443, 136 L.Ed.2d 339 (1996); Hiveley, 61 F.3d at 1360; United States v. Collins, 61 F.3d 1379, 1384 (9th Cir.1995), cert. denied, 516 U.S. 1000, 116 S.Ct. 543, 133 L.Ed.2d 446 (1995); United States v. Paradis, 802 F.2d 553, 558 (1st Cir.1986). Courts have noted, however, that while omissions are not exempt from inquiry under Franks, affidavits containing omissions of potentially exculpatory information are less likely to present a question of impermissible official conduct than those that affirmatively include false information. Atkin, 107 F.3d at 1216-17; United States v. Martin, 920 F.2d 393, 398 (6th Cir.1990); United States v. Colkley, 899 F.2d 297, 301 (4th Cir.1990). In cases involving omissions, to trigger an evidentiary

hearing, a defendant must make a substantial preliminary showing that: 1) the omission was made intentionally and/or with reckless disregard for the omission's tendency to mislead and 2) if the omitted material had been included in the supporting affidavit, there would not have been probable cause. See, e.g., Atkin, 107 F.3d at 1217 ("If the defendant does succeed in making a preliminary showing that the government affiant engaged in 'deliberate falsehood' or 'reckless disregard for the truth' in omitting information from the affidavit, the court must consider the *395 affidavit, including the omitted portions, and determine whether probable cause still exists."); see also, Tomblin, 46 F.3d at 1377; Hiveley, 61 F.3d at 1360; Collins, 61 F.3d at 1384; Paradis, 802 F.2d at 558.

The Fifth Circuit has acknowledged that "it will often be difficult for an accused to prove that an omission was made intentionally or with reckless disregard rather than negligently unless he has somehow gained independent evidence that the affiant had acted from bad motive or recklessly in conducting his investigation and making the affidavit." United States v. Martin, 615 F.2d 318, 329 (5th Cir.1980). For this reason, the Fifth Circuit has recognized that "when the facts omitted from the affidavit are clearly critical to a finding of probable cause the fact of recklessness may be inferred from proof of the omission itself." Id. (emphasis added). See also, United States v. Cronan, 937 F.2d 163, 165 (5th Cir.1991); Hale v. Fish, 899 F.2d 390, 400 (5th Cir.1990) (same); United States v. Namer, 680 F.2d 1088, 1094 (5th Cir.1982), cert. denied, 486 U.S. 1006, 108 S.Ct. 1731, 100 L.Ed.2d 195 (1988). Thus, under Fifth Circuit law, if the materiality of the omission is great enough, recklessness can be inferred. In such cases, the analytical concepts of materiality and recklessness are "bound together," collapsing the dual inquiry of Franks into both "intentionality" and "materiality" into a single inquiry into materiality. Namer, 680 F.2d at 1094. But see, Colkley, 899 F.2d at 301 (rejecting Fifth Circuit position that bad motive under Franks can be inferred from fact of omission alone because Franks intended for a inquiry into both

intentionality and materiality in all cases). However, reckless intent is to be inferred only in extreme cases when the materiality of the omitted material is "clearly critical" to the probable cause determination. [FN22]

FN22. Cleveland, 964 F.Supp. at 1076-1078.

[1] Applying the Franks analysis to this case, the Court finds that the defendants have failed to make the requisite substantial preliminary showing for an evidentiary hearing. The Court further finds that the defendants' assertion of falsity and/or intentional omission are unpersuasive and without merit in light of all of the information available to the affiant at the time he signed the affidavit. The fact that Agent Santini admitted during the trial that there were several errors in his affidavit regarding facts pertaining to payoffs to members of the Gaming Board does not change the Court's decision or require an evidentiary hearing. There was an adequate factual and good faith basis for the statements made in the affidavit at the time the affidavit was prepared and submitted to the issuing judges. The same may be said of the arguments defendants make regarding the circumstances surrounding Patrick Graham's credibility. The Court finds that the affidavits contained sufficient information about Patrick Graham's past and current criminal activity for the issuing judges to consider in determining whether to issue the warrants. The fact that a judge in Texas may now be conducting an inquiry into the circumstances surrounding the plea agreement that the government made with Patrick Graham does not affect the validity of the affidavits submitted to Judges Parker and Walter. Even if there were alleged errors or omissions in the affidavits, these alleged errors or omissions do not negate the probable cause which existed in the affidavits. In short, the Court finds that the federal agent did not "intentionally mislead," or trick, the district court into issuing the surveillance authorizations. The Court also finds there were no material misrepresentations made by the FBI agents which would have negated a probable cause finding by the two judges who issued

the defendants cite the testimony of C.J. Blache.[145] The record reflects that this testimony was offered, not to prove the truth of the matter asserted, but rather to establish the witnesses' state of mind at the time of the incident. This fully satisfied the requirements of Rule 803.

After reviewing the argument regarding the defendants' objections to evidentiary rulings made by the Court, the Court finds the evidence was properly admitted under the Federal Rules of Evidence. To the extent the Court may have erred in any evidentiary ruling, the Court finds such evidence does not warrant a finding that a new trial or judgment of acquittal should be granted.

Admission of Communications Between Cecil Brown and His Attorneys

The defendants argue that the Court improperly admitted recordings of intercepted telephone conversations between the defendant, Cecil Brown, and his attorneys, which occurred during a civil suit.[146] According to the defendants, this evidence was not only privileged information, it was highly prejudicial to Cecil Brown.

The Court has previously considered the admissibility of these recordings. Prior to trial, the government filed a motion in limine regarding the admissibility of these tapes, which the

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[145]Rec. Doc. No. 1475 (Defendants' Memorandum in Support of Motion for Judgment of Acquittal, Motion for New Trial), p. 58.

[146]Rec. Doc. No. 1475 (Defendants' Memorandum in Support of Motion for Judgment of Acquittal, Motion for New Trial), p. 59.

defendants opposed.[147] The Court granted the government's motion in limine and permitted these tapes to be introduced at trial based on the crime/fraud exception to the attorney-client privilege.[148] The defendants do not raise any new arguments in their post-trial motions on the issue. Therefore, the Court adopts its prior reasons for admitting this evidence at the trial.

Recusal in this Case Based on Recusal in United States v. Brown

In a supplement to their motion for a new trial, the defendants argue that the jury's verdict should be set aside because this judge should have recused himself in this case.[149] In support of this argument, the defendants cite the Court's recusal in United States v. Brown.[150] The Court recused itself in Brown for two principal reasons: (1) the name of the U.S. Attorney for the Middle District of Louisiana was set forth in the indictment and it was possible he would be called as a witness in the Brown trial; and (2) the Court had received a telephone call from a witness regarding the job qualifications of another possible witness.[151]

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[147]Rec. Doc. No. 756.

[148]Rec. Doc. No. 858. The Court's ruling was, in part, based on a ruling issued by Judge Parker in conjunction with the grand jury investigation of this matter which had been placed under seal. See Rec. Doc. No. 858, p. 1, n. 3.

[149]Rec. Doc. No. 1489.

[150]See CR No. 99-151, Rec. Doc. Nos. 254 (order), 261 (written reasons).

[151]This phone call occurred prior to the beginning of any federal investigation.

The defendants now argue that because the government presented evidence from Brown in support of its motion for anonymous jury, the Court's reasons for recusing itself in Brown should likewise apply to this case.[152] The defendants' arguments are without merit. In deciding the anonymous jury matters, the jurisprudence clearly indicates that the Court was not required to make credibility assessments. The Court was only required to look to allegations that, if true, would justify the impanelment of an anonymous jury.[153] The Court has previously noted that the evidence offered in support of the anonymous jury motion in this case was more than ample to justify granting the motion, even if the Court did not consider the allegations against Edwin Edwards discussed in the Brown indictment.[154] This Court had no reason in law or fact to recuse itself in this case.[155]

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[152]Specifically, the defendants argue that: (1) the government referenced the insurance indictment and the guilty plea of Judge Sanders in support of their motion for anonymous jury; (2) the government specifically cited the alleged witness tampering of Ed Gonzales as a basis for granting the anonymous jury motion in this case; (3) by doing so, the Court was required to make a credibility determination regarding Ed Gonzales' testimony. See Rec. Doc. No. 1489, p. 4.

[153]See Rec. Doc. No. 1508 (anonymous jury ruling), Appendix B. See also United States v. Krout, 66 F.3d 1420 (5th Cir. 1995), cert. denied, 516 U.S. 1136, 116 S. Ct. 963, 133 L.Ed.2d 884 (1996); United States v. Paccione, 949 F.2d 1183 (2nd Cir. 1991), cert. denied, 505 U.S. 1220, 112 S. Ct. 3029, 120 L.Ed.2d 900 (1992).

[154]Rec Doc. No. 1508, p. 16, n. 50.

[155]The defendants also filed a pretrial motion to recuse. The Court denied this motion for written reasons assigned. This opinion is adopted herein by reference. See Rec. Doc. No. 81, Appendix G.

Conclusion

The Court has very carefully considered all of the arguments and contentions of the parties, whether specifically discussed herein or note. After reviewing the entire record, the Court finds that the defendants received fair and impartial trial. The Court further finds that the guilty verdicts returned by the jury are fully supported by the law and evidence in this case. It is apparent that the jury which heard this case carefully and meticulously reviewed the evidence and applied the law as given to it by the Court before returning their verdicts in this case. There are no legal or factual reasons for the court to disturb the jury's verdict except on those counts for which a new trial was required under Cleveland.

Therefore, IT IS ORDERED that defendants' motions for judgment of acquittal and post-verdict judgment of acquittal be and each is hereby DENIED.

IT IS FURTHER ORDERED that defendants' motion for a new trial is GRANTED on the following counts and on behalf of the following defendants:

Bobby Johnson - Count 6;

Edwin Edwards - Counts 20, 21, 22, 25, 26 and 27;

Steven Edwards - Counts 20, 21, 22, 25, 26 and 27.

IT IS FURTHER ORDERED that in all other respects, defendants' motion for a new trial be and it is hereby DENIED.

IT IS SO ORDERED.

Baton Rouge, Louisiana, January 5, 2001.

/s/

FRANK J. POLOZOLA, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

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119 F.Supp.2d 589
(Cite as: 119 F.Supp.2d 589)

United States District Court,
M.D. Louisiana.
UNITED STATES of America
v.
Edwin EDWARDS, et al.
No. Crim.A. 98-165-B-M2.
July 27, 2000.

United States filed a motion for an anonymous jury in prosecution based on alleged attempts to corrupt legal system for awarding riverboat gaming licenses. The District Court, Polozola, Chief Judge, held that totality of all of the circumstances established a clear and actual need to withhold the names, addresses and places of employment of the jurors.

Motion granted.

West Headnotes

[1] Jury k144
230k144

Factors that may justify anonymity of a jury include: (1) defendant's involvement in organized crime; (2) defendant's participation in a group with the capacity to harm jurors; (3) defendant's past attempts to interfere with the judicial process or witnesses; (4) potential that, if convicted, defendant will suffer a lengthy incarceration and substantial monetary penalties; and (5) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation and harassment.

[2] Jury k144
230k144

Courts may receive evidence in camera and/or ex parte in ruling on motion for anonymous jury.

[3] Jury k144
230k144

Motion for anonymous jury may also be determined by the trial court without any hearing on the matter.

[4] Jury k144
230k144

Totality of all of the circumstances established a clear and actual need to withhold the names, addresses and places of employment of the jurors since empaneling an anonymous jury was the only manner in which court could ensure that jurors were protected from outside influence and intimidation from persons associated with the government, the defendants, the media, and individuals who had an interest for or against any of the parties or the jurors; crimes charged suggested attempts to corrupt legal system for awarding riverboat gaming licenses, there was evidence pertaining to matters involving jury selection and possible jury tampering in two earlier criminal trials involving key defendant, each defendant faced substantial terms of imprisonment and staggering penalties and forfeitures if convicted, and extensive publicity of the proceedings enhanced the possibility that jurors' names would become public, thereby exposing them to possible intimidation, harassment, and attempted media contacts during the trial.

[5] Jury k144
230k144

Once decision to empanel an anonymous jury is made, trial court must take appropriate action to ensure the parties are given adequate voir dire to allow the parties to have sufficient information to meaningfully exercise their challenges; focus of the inquiry is whether the defendants were prejudiced in selecting an impartial jury because relevant and meaningful information was withheld from them.

[6] Jury k144
230k144

Defendants' rights to intelligently exercise peremptory challenges would not be impaired by empaneling an anonymous jury where parties were provided with an "arsenal of information" based upon the extensive questionnaires completed by potential jurors, as well as court's individual voir dire of potential jurors.

[7] Jury k144
230k144

Defendants' constitutional rights to a presumption of innocence until proven guilty beyond a reasonable doubt would not be impaired by empaneling an anonymous jury where jurors were provided with neutral, nonprejudicial reasons for the court's decision in order to protect the defendants' constitutional right to a fair trial.

*590 James B. Letten, Peter G. Strasser, Dept. of Justice, U.S. Atty.'s Office, New Orleans, LA, Michael William Manger, U.S. Atty.'s Office, E.D. La., New Orleans, Thomas L. Watson, Dept. of Justice, U.S. Attys. Office, New Orleans, LA, Eddie J. Jordan, Jr., U.S. Atty.'s Office, New Orleans, LA, Stephen A. Higginson, U.S. Atty.'s Office, E.D. La., New Orleans, LA, for U.S.
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Miller, Cassidy, Larroca & Lewin, LLP, Washington, DC, for Andrew Martin.
James Michael Small, Law Offices of J. Michael Small, Alexandria, LA, for Bobby Johnson.

RULING

POLOZOLA, Chief Judge.

The United States of America [FN1] filed a Motion for an Anonymous Jury in this case. [FN2] The defendants opposed the motion. [FN3] On January 7, 2000, the Court granted the government's motion. [FN4] The Court now assigns its reasons for granting the government's motion.

FN1. The United States of America will hereinafter sometimes be referred to as "the government" and "the United States."

FN2. Rec.Doc. No. 278.

FN3. Rec.Doc. No. 296.

FN4. Rec.Doc. No. 887.

BACKGROUND

The grand jury for the Middle District of Louisiana returned a 34-count indictment and later a superseding indictment against Edwin W. Edwards, Stephen Edwards, Cecil Brown, Andrew Martin, Bobby Johnson, Gregory Tarver, and Ecotry Fuller. This indictment charged, among other things, violations of Racketeer Influenced Corrupt Organization Act ("RICO"), [FN5] RICO conspiracy, mail and wire fraud, illegal wiretapping, money laundering and extortion. Because of the high media interest in this case, the Court issued a "gag order" on November 9, 1998 [FN6] and February 9, 2000 [FN7] in an attempt to control prejudicial statements made by the parties in this case and to ensure the parties would receive a fair trial with an impartial jury. The Court also issued a credentialing order for members of the media and another order allowing the press to have a place to conduct interviews outside of the federal courthouse. [FN8] To further ensure a fair and impartial jury which would not be subject to improper and prejudicial contact, influence, or harassment from the parties, the press and others, the Court granted the government's motion for an anonymous jury to the extent the Court withheld the *591 names, addresses [FN9] and places of employment of the jurors from the parties, the media and the public. The Court now assigns reasons to support its decision.

FN5. 18 U.S.C. s 1961.

FN6. Rec.Doc. No. 3.

FN7. Rec.Doc. No. 1010.

FN8. Rec.Doc. Nos. 47 (Credentialing Order) and 292 (Media Bullpen Order).

FN9. As will be noted later, while the Court did not give the specific street address, the Court did provide the parties with the

juror's zip code and parish of residence.

CONTENTIONS

The government requested an anonymous jury for the following reasons: (1) "Edwin Edwards is alleged to have been the central figure of an enterprise which corrupted a major industry in the State of Louisiana;" [FN10] (2) Edwin Edwards accomplished the alleged illegal acts "in large measure through the power of his elected office as governor;" [FN11] (3) Edwin Edwards and Stephen Edwards are charged with interfering with the lawful judicial process, specifically conspiring to obtain illegal wiretaps of the homes of FBI agents who were investigating their criminal activity; (4) Edwin Edwards is charged with interfering with the lawful judicial process, specifically attempting to bribe Judge Alfred Foster Sanders, III and offering to terminate a pending investigation being conducted by the United States Attorney for the Middle District of Louisiana; [FN12] (5) all defendants potentially face lengthy prison sentences; and (6) the potential for publicity and/or harassment of jurors due to the high level of media scrutiny. [FN13]

FN10. Rec.Doc. No. 278.

FN11. Rec.Doc. No. 278.

FN12. These acts are alleged in the indictment filed in United States v. James Brown, Alfred Foster Sanders, III, Edwin Washington Edwards, Robert Andre Bourgeois, David Judd Disiere, and Ronald R. Weems, Cr-99-151 (M.D.La.). Alfred Foster Sanders, III and Robert Andre Bourgeois have entered guilty pleas in that case.

FN13. The government submitted the following affidavits in support of the motion for anonymous jury: (1) FBI Agent Dennis Horner; (2) FBI Agent Dennis Swikert; (3) Josephine Beninati, Financial Analyst with the FBI; (4) FBI Agent Theresa Hultz;

(5) Supervising FBI Agent Geoffrey Santini; and (6) Sid Moreland. The government also submitted the following exhibits: (1) the factual basis underlying Dempsey White's plea agreement; (2) an article which appeared in the Baton Rouge Advocate on July 2, 1999; (3) a transcript from a wiretap of a conversation between Constance A. Koury and Edwin Edwards; (4) an AP wire article dated January 17, 1986; (5) the indictment filed in United States v. James Brown, et al; and (6) the superseding bill of information and factual basis related to Judge Foster Sanders, who pled guilty in United States v. James Brown, et al.

The defendants have filed an opposition to the motion for anonymous jury based on the following reasons: [FN14] (1) there is no evidence of any of the defendants being tied to "organized crime" in the traditional sense; (2) there is no evidence of physical harm present; (3) the defendants have not interfered with the judicial process; (4) the defendants would suffer prejudice if an anonymous jury is empaneled; and (5) there is a strong potential to adversely affect the exercise of their peremptory and cause challenges during voir dire. Defendants rely heavily on the factors enunciated in United States v. Krout [FN15] to support their arguments.

FN14. The defendants submitted the following affidavits in opposition to the motion for anonymous jury: (1) Camille Gravel; (2) Evelyn Gravel; (3) Debbie Baer (two affidavits); (4) Mike Baer; (5) Ann Davenport; (6) Victor Bussie; (7) Fran Bussie; Susan McDuff Fontenot; (8) Edwin Edwards; and (9) Patrick Fanning. Defendants also submitted an excerpt from a conference in the chambers of Judge Vance in the matter of United States v. Cleveland on June 19, 1997, and statements made by Patrick Fanning in open court on September 17, 1999.

FN15. 66 F.3d 1420 (5th Cir.1995).

Oral argument was held on the motion on September 14, 16 and 17, 1999. The Court granted the motion and noted it would assign written reasons at a later date. These reasons now follow.

LEGAL STANDARDS

The issue of whether a court may use an anonymous jury in the trial of a defendant *592 charged with a criminal offense is not a matter of first impression. The Fifth Circuit as well as other circuits have approved the use of an anonymous jury under certain circumstances. A review of the jurisprudence from the Fifth Circuit and the facts of this case support the Court's decision to use a partially anonymous jury herein. While the Court did grant the government's motion to use an anonymous jury in this case, the use of the term "anonymous" is very misleading. It is true the Court did not give the parties, the media or the public the names, addresses or places of employment of the jurors. However, the Court did provide all concerned with a voluminous amount of information about each juror. The Court used a 28-page questionnaire which was answered by each potential juror and consisted of 116 questions, some with numerous sub-parts. [FN16] In addition, the Court conducted an extensive voir dire of the potential jurors comprising approximately 2,000 pages of transcript. The parties were permitted to suggest questions and follow up questions to be asked of each juror. All of the parties had an exhaustive amount of knowledge about each juror which allowed each of them to make an informed decision on which jurors should be accepted, challenged for cause, or peremptorily challenged. The Court now turns to a discussion of the jurisprudence from the Fifth Circuit on this issue.

FN16. A copy of the questionnaire used is attached as Appendix A to this opinion. The parties stipulated to the questions set forth in this questionnaire.

The Fifth Circuit Court of Appeals first addressed the issue of whether it was proper to have an anonymous jury in United States v. Krout. [FN17] In Krout, as in this case, the names, addresses, and places of employment of the jurors were withheld. Relying on jurisprudence from the Second Circuit, the Fifth Circuit set forth several factors that may justify anonymity of a jury: (1) the defendant's involvement in organized crime; (2) the defendant's participation in a group with the capacity to harm jurors; (3) the defendant's past attempts to interfere with the judicial process or witnesses; (4) the potential that, if convicted, the defendant will suffer a lengthy incarceration and substantial monetary penalties; and (5) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation and harassment. [FN18]

FN17. 66 F.3d at 1420.

FN18. Krout, 66 F.3d at 1427 (citations omitted).

In Krout, the Fifth Circuit affirmed the trial court's decision to empanel an anonymous jury. The appellate court found that the district court's decision was supported by the evidence adduced at the trial and by the wiretap affidavits presented by the government. Additionally, the Fifth Circuit found that the "Texas Mexican Mafia" was an inherently dangerous organization. Since Krout was decided, a number of Fifth Circuit decisions have upheld use of anonymous juries under a variety of circumstances. A careful review of those cases is in order. In United States v. Riggio, [FN19] the defendant was indicted for conspiracy to commit arson and use of fire to commit a federal felony. Concerned about possible jury tampering, the trial court assigned numbers to the jurors to assure anonymity. The trial court based its decision to use an anonymous jury on the following factors: (1) the record reflected that witnesses were allegedly threatened; [FN20] (2) the defendant had been accused of jury tampering in a previous case; and (3) there were alleged ties of the defendant to organized crime. In affirming

the district court, the *593 Fifth Circuit stated the following with respect to the propriety of empaneling an anonymous jury:

FN19. 70 F.3d 336 (5th Cir.1995).

FN20. "The record reflects that witness A was told he would be a 'dead mother' if he cooperated, witness B was told Riggio would 'blow his brains out,' and witness C was told that the witnesses would become a part of 'history ... real quick.' " 70 F.3d at 338.

In determining whether jurors need protection, the district court should consider the defendant's involvement in organized crime, his past attempts at interfering with judicial proceedings, his previous history of violence, the extent of press coverage, and the likelihood of juror harassment or intimidation. [FN21]

FN21. Riggio, 70 F.3d at 339-340 (emphasis added) (citing United States v. Paccione, 949 F.2d 1183 (2nd Cir.1991)).

The Fifth Circuit also noted that Riggio had "committed fraud in order to serve on another jury, demonstrating a lack of respect for the judicial process and suggesting that he was capable of and willing to interfere with the jury system." [FN22] The Court also noted that "[t]he district court had a reasonable basis to conclude that similar threats and attempts at intimidation were likely to be made to the jurors if their identities were known." [FN23]

FN22. Riggio, 70 F.3d at 340, n. 21.

FN23. Riggio, 70 F.3d at 340, n. 22.

In United States v. Branch, [FN24] a trial involving the Branch Davidians, the district court sua sponte ordered the use of an anonymous jury. The Fifth Circuit upheld the trial court's decision. However, in doing so, the Fifth Circuit stated that

referring to the jury as "anonymous" was misleading for the following reasons:

FN24. 91 F.3d 699 (5th Cir.1996), cert. denied, Branch v. United States, 520 U.S. 1185, 117 S.Ct. 1467, 137 L.Ed.2d 681 (1997).

Anonymity has long been an important element of our jury system. Jurors are randomly summoned from the community at large to decide the single case before them and, once done, to "inconspicuously fade back into the community." "Anonymous jury" has come to mean something different in recent years, signaling the district court's decision to withhold certain biographical information about potential jurors from the parties involved. That said, we should be wary of painting with too broad a brush. "Anonymous" juries include those about whom more has been concealed than here. The jurors here were not "anonymous" except in the most literal sense. The district court ordered only the jurors' names and addresses be withheld from the parties. Otherwise, the court provided the defendants with a wealth of information about the venire, including occupations and names of employers. [FN25]

FN25. Branch, 91 F.3d at 723 (citations omitted).

Thus, the Fifth Circuit does not consider a district court's decision to withhold the names and addresses of the jurors to truly qualify the jury as "anonymous."

The Branch Court further stated that the trial court is required to "make a sensitive appraisal of the climate surrounding a trial and a prediction as to the potential security or publicity problems that may arise during the proceedings." [FN26] In discussing the Krout factors, the Fifth Circuit stated that there was no intent to suggest that "these or some aggregate must be established on pain of reversal." [FN27] The Court stressed that district courts should look to the "totality of the circumstances." [FN28]

FN26. Branch, 91 F.3d at 723 (citing United States v. Childress, 58 F.3d 693, 702 (D.C.Cir.1995), cert. denied, 516 U.S. 1098,
116 S.Ct. 825, 133 L.Ed.2d 768 (1996)).

FN27. Branch, 91 F.3d at 724.

FN28. Branch, 91 F.3d at 724 (citing United States v. Ross, 33 F.3d 1507, 1521 (11th Cir.1994)) (emphasis added).

The trial court in Branch based its decision to withhold the names and addresses of the jurors on a number of factors. Specifically, the court found that an anonymous jury was proper "because of the 'enormous amount of world-wide attention' generated by the case and the emotionally charged atmosphere surrounding it. Not *594 all celebrated trials merit an anonymous jury, but '[t]he prospect of publicity militates in favor of jury anonymity to prevent exposure of the jurors to intimidation or harassment.'" [FN29] Because the defendants in Branch were furnished with answers to eighty (80) detailed questions, the defendants' ability to select an impartial jury had not been prejudiced. The Court also emphasized that at voir dire, "the court asked the defendants' proposed questions and elicited additional information regarding potential juror bias." [FN30] In rejecting the defendants' assertion that their ability to select an impartial jury had been impaired, the court noted that defense counsel had available an "arsenal of information" about each prospective juror.

FN29. Branch, 91 F.3d at 724 (citations omitted) (emphasis added).

FN30. Branch, 91 F.3d at 725 (citing United States v. Wong, 40 F.3d 1347, 1377 (2nd Cir.1994) (upholding anonymous jury where "extensive" voir dire adequately explored prospective juror bias)).

In United States v. Sanchez, [FN31] the trial court redacted certain identifying juror information because of a 10-day delay between jury selection and the commencement of the evidentiary phase of the trial and the potential fears of jurors in adjudicating the guilt or innocence of a "rogue" police officer. The Fifth Circuit reversed the district court's decision to empanel an anonymous jury, concluding that there was no evidence that the defendant had attempted to interfere with the judicial process or witnesses, and there was no indication that the jurors would be subjected to the type of extensive publicity that might bring about intimidation and harassment. The Court held that the district court's decision must rest on more than "mere allegations or inferences of potential risk." [FN32] Based upon the dearth of evidence supporting use of an anonymous jury in Sanchez, the Fifth
Circuit held that the trial court abused its discretion.

FN31. 74 F.3d 562 (5th Cir.1996).

FN32. Sanchez, 74 F.3d at 564 (citing Krout, 66 F.3d at 1427).

The Fifth Circuit continued its evaluation of the use of anonymous juries in United States v. Salvatore [FN33] which involved seventeen defendants who were indicted for operating a criminal enterprise that subverted the licensing requirements of Louisiana's Video Poker Law, charges similar in nature to those contained in the present indictment. Fourteen of the seventeen defendants pled guilty prior to the trial. The district court empaneled an anonymous jury. The trial court found that Salvatore and the Tusas were closely connected with organized crime. The government also submitted evidence which showed that there was an ongoing investigation into possible jury tampering in connection with one defendant's acquittal of criminal charges in state court. Furthermore, there was evidence indicating that certain defendants showed a "willingness to interfere with the judicial process," [FN34] namely their guilty

pleas to the video poker conspiracy. The Court also found that extensive publicity surrounding the trial "enhanc[ed] the possibility that the jurors' names would have become public." [FN35]

FN33. 110 F.3d 1131 (5th Cir.1997).

FN34. 110 F.3d at 1144.

FN35. 110 F.3d at 1144.

In affirming the trial court's decision to empanel an anonymous jury, the Fifth Circuit reiterated the factors previously set forth in Krout which may be considered by a trial judge. The Fifth Circuit also noted that a "district court may certainly consider evidence other than that relating to these five factors when deciding whether to empanel an anonymous jury, for the decision to do so should be based upon the 'totality of the circumstances.'" [FN36] Two of the defendants who had pled guilty in Salvatore also pled guilty to jury tampering *595 in a prior case. The Fifth Circuit stated that the involvement of these two defendants in the video poker conspiracy "establishes that [the three] appellants participated in a criminal enterprise and conspired with individuals having the capacity and willingness to interfere with the judicial process." [FN37] Thus, a defendant's association with persons who have the capacity or willingness to interfere with the judicial process may be considered by the trial judge in determining whether to empanel an anonymous jury. [FN38] In addition to the fact that the three appellants in Salvatore were connected with organized crime, the Fifth Circuit noted the following upon review: (1) the defendants initially faced potentially long sentences; and (2) "the publicity surrounding the trial was quite extensive, thus enhancing the possibility that the jurors' names would have become public." [FN39]

FN36. Salvatore, 110 F.3d at 1143 (citing Branch, 91 F.3d at 724 (emphasis added)).

FN37. 110 F.3d at 1144.

FN38. Such is the case before the Court. A number of persons have pled guilty to related charges set forth in United States v. Edwards and United States v. Brown. These pleas clearly show an association with persons who have the capacity or willingness to interfere with witnesses or the judicial process.

FN39. Salvatore, 110 F.3d at 1145.

While most of the Fifth Circuit cases in which anonymous juries were approved involved persons associated with organized crime (with the exception of Branch), it is clear that this is not a required factor under the Fifth Circuit jurisprudence. The "organized crime factor" weighs heavily in favor of an anonymous jury, but it is only one of the numerous factors which may be considered based on the "totality of the circumstances" of the case. [FN40] In Branch and Salvatore, the Fifth Circuit discussed the factors enumerated in Krout and stressed that those factors were not the sole matters to be considered by the court in making its decision. In Branch, the Court, noted that "[o]ther circumstances may also justify [the use of an anonymous jury]. Indeed, while evidence that the defendant has in the past or intends in the future to tamper with the jury may be sufficient to warrant an anonymous jury, it is by no means necessary." [FN41] Thus, under Fifth Circuit jurisprudence, the analysis the Court must make in deciding whether to use an anonymous jury is fact intensive and depends upon the particular and total circumstances involved in the case. It is also clear that the use of an anonymous jury satisfies constitutional muster "when needed to ensure against a serious threat to juror safety provided the defendant's interest in the conduct of an effective voir dire of prospective jurors and the presumption of innocence are maintained." [FN42] A lower court's decision to empanel an anonymous jury is entitled to deference and is subject to abuse of discretion of review. [FN43]

FN40. See, Salvatore, 110 F.3d at 1135 (citing United States v. Branch, 91 F.3d 699, 724).

FN41. Branch, 91 F.3d at 724 (citations omitted).

FN42. Riggio, 70 F.3d at 339.

FN43. Krout, 66 F.3d at 1426.

The Court now turns to a review of the evidence which supports the Court's decision to empanel an anonymous jury in this case.

ANALYSIS

[1][2][3][4] It is clear from the Fifth Circuit jurisprudence that a trial court may consider various forms of evidence in deciding whether to empanel an anonymous jury. The list of factors set forth in Krout is not intended to be exhaustive. In fact, a court must look to the totality of the circumstances and may consider additional factors beyond those enumerated in Krout. The courts may receive evidence in camera and/or ex parte. [FN44] A motion for anonymous *596 jury may also be determined by the trial court without any hearing on the matter. [FN45] The evidence presented to the Court in connection with the government's motion for anonymous jury, the testimony and exhibits presented during the course of the trial, matters pertaining to the jury which occurred during the trial, and extensive media attempts to contact the jurors during the trial clearly support the Court's decision to empanel an anonymous jury. There was also a serious concern on the part of some jurors about being identified during voir dire and after the trial. This important factor was considered by the Court and also supports the Court's decision herein. [FN46]

FN44. See, United States v. Paccione, 949 F.2d 1183 (2nd Cir.1991) (court considered affirmations received in camera, ex parte); United States v. Salvatore, 110 F.3d 1131 (5th Cir.1997)

(court considered evidence in camera; ex parte). While the Court did receive from the United States an affidavit which complained of an alleged threat signed by Sid Moreland, the Court did not consider this information about an alleged threat in making its decision. During the trial, the Court ordered the United States to give a copy of the Moreland affidavit to the defendants while Moreland was testifying.

FN45. Krout, 66 F.3d at 1420 (no hearing held and the court relied upon unsworn affidavits); United States v. Edmond, 52 F.3d 1080 (D.C.Cir.1995) (sua sponte and without a hearing); United States v. Eufrasio, 935 F.2d 553 (3rd Cir.1991) (hearing not required as a matter of law, though it is a better practice to record findings and reasons when empaneling anonymous juries); United States v. Wilson, 160 F.3d 732 (D.C.Cir.1998) (evidentiary hearing was unnecessary where court relied upon the charges in the indictment and prosecutor's affidavit).

FN46. See, Rec.Doc. No. 1350 (Minute Entry which indicated nine of the eleven jurors did not want to be contacted by the press).

A review of this evidence is in order.

A number of factors weigh in favor of an anonymous jury in this case. First, the nature of the charges brought against Edwin and Stephen Edwards in this case and the nature of the charges brought against Edwin Edwards and others in United States v. Brown are indicative of attempts by Edwin Edwards and Stephen Edwards and others associated with them to interfere with the judicial process or witnesses. Edwin Edwards and Stephen Edwards are charged in Count 33 of the superseding indictment in this case with illegal wiretapping and counter surveillance of an FBI agent. [FN47] A co-defendant, Dempsey White, has already pled guilty to a crime relating to the allegations set forth in Count 33. [FN48] The other charges set forth in this indictment also show a pattern to disregard the judicial and

administrative process established by the State of Louisiana for the proper selection of licenses to operate gaming riverboats in Louisiana. [FN49]

FN47. This charge was severed with the consent of all parties.

FN48. Dempsey White plead guilty to the offense of misprision of a felony relative to his failure to reveal the existence of these criminal acts to the authorities.

FN49. A number of persons plead guilty to these charges and testified at the trial.

In the indictment returned against Edwin Edwards in United States v. James Harvey Brown, et al., Edwin Edwards is charged with tampering with a witness pursuant to 18 U.S.C. s 1512(b)(3). [FN50] Judge Edith Brown Clement recently granted the government's motion for an anonymous jury in that case. [FN51]

FN50. The Court recused itself in the Brown case for reasons unrelated to this case. See Rec.Doc. Nos. 254, 261 (Cr-99-151). When ruling on the pending anonymous jury motion, the Court was not required to make credibility determinations of any potential witnesses in the Brown case. As noted elsewhere in this opinion, the Court is not required to look beyond the allegations of certain facts that, if true, would justify the impanelment of an anonymous jury. Even if the Court excludes the allegations against Edwin Edwards which are set forth in the indictment in Brown, an anonymous jury would still be warranted under the facts of this case. While the defendants have filed a motion to recuse this Court in this case because of its recusal in Brown, neither the law nor the evidence in this case requires recusal. See Rec.Doc. No. 1489.

FN51. Rec.Doc. No. 270 (Cr-99-151)

Both the government and the defendants submitted evidence pertaining to matters involving jury selection and possible jury tampering in two earlier criminal *597 trials involving Edwin Edwards in the Eastern District of Louisiana in the 1980s. There are numerous affidavits presented from the current and former Commandants of the Louisiana State Police, attorneys in the former cases and others who may have been involved in the jury selection process. This Court does not believe it is necessary for the Court to determine with certainty whether all of the events which were alleged in these affidavits actually occurred. The potential for these events to have interfered with the judicial process is sufficient evidence for the Court to take into consideration, together with the other evidence in this case. Indeed, there was very credible evidence presented in the form of affidavits which suggest that the methods used to select jurors in the earlier cases had the potential to affect the judicial process in the earlier case.

The evidence presented during the course of the current trial also established that Andrew Martin had the potential for interfering with the judicial process. In a taped conversation which occurred in Edwin Edwards' office on January 9, 1997, Andrew Martin states that he has obtained a transcript of a wiretap from a "friend of a friend." [FN52] The transcript of this conversation, [FN53] which was played to the jury in connection with the Treasure Chest scheme provides:

FN52. This tape and the corresponding transcript were introduced in connection with the Treasure Chest scheme. Andrew Martin was found guilty on charges related to this scheme.

FN53. Designated by the government during trial as transcript number 110.

[AM--Andrew Martin
EWE--Edwin W. Edwards]

AM: (UI). (Greetings in French)
EWE: (UI) what you got there?
(Rustling noises heard)
AM: You uh, see this? It's on the transcript of the wire tap for, from LARRY.
EWE: From LARRY?
AM: Yeah.
EWE: The whole thing?
AM: No. You want the whole thing?
EWE: Anything about you in here?
AM: No. Uh huh.
EWE: Huh?
AM: Uhn huh.
EWE: Anything about me?
AM: No. Have the DEQ guy KUARSKI (ph) in there. (Pause) I don't need it. You can have it if you want to. I'll let you have it but I'd like to get it back if I can. If you uh you wanna read it.
(Pause in conversation)
AM: As long as you're not in there you don't care uhh Chief. (Chuckles). But some of the stuff it said, LARRY really, you Know ...
EWE: Come on strong.
AM: (Sighs). I'll tell you what you know, some of that, some of that stuff he, language he said was, uh, was something else.
(Pause)
EWE: A lot of loose tongues in here.
AM: So you really don't realize after you read one of these things what they can do, what they can't do.
(Pause)
EWE: Where did you get this?
AM: Friend of a friend of a friend.
(Chuckles)
(Pause)
AM: You want it you can have it. I really don't need it.
EWE: Huh?
AM: I really don't need it. You can have it if you want it.
EWE: I'll take it and I'll read it just for the hell of it

It is also appropriate to consider crimes charged in an indictment when determining *598 use of an anonymous jury. [FN54] The crimes charged in the indictment in this case clearly suggest attempts to corrupt the legal system of selecting licenses under the laws and regulations of the State of Louisiana pertaining to riverboat gaming licenses. These matters may also be considered against all of the defendants. The allegations become even more relevant when the Court considers the number of persons associated with the defendants who have plead guilty to charges related to the indictment returned in this case.

FN54. See, Riggio, 70 F.3d at 336 (defendant accused of jury tampering in a previous case).

In United States v. Salvatore, [FN55] the Fifth Circuit affirmed the trial court's consideration of a "current" investigation of jury tampering on the part of a co-defendant and consideration of the appellants' alleged involvement in a video poker conspiracy with two co-defendants who pleaded guilty to the conspiracy prior to empaneling an anonymous jury. The Fifth Circuit stated that these considerations established that the "appellants participated in a criminal enterprise and conspired with individuals having the capacity and willingness to interfere with the judicial process." [FN56] The same situation is presented in the present case with regard to Edwin Edwards, Stephen Edwards and Andrew Martin and their co-conspirators. In Salvatore, the Fifth Circuit said it was proper for the trial court to consider an ongoing investigation into possible jury tampering on the part of a co-defendant in support of using an anonymous jury. The evidence is even stronger in the present case. Here, an investigation resulted in two indictments being returned against Edwin Edwards for allegedly trying to engage in illegal wire tapping, witness tampering and engaging in the other conduct alleged in the indictment in this case and in United States v. Brown. In addition, co-defendants and other persons have entered guilty pleas to charges related to those in the two cases.

In addition, Stephen Edwards was charged with similar conduct in this case and a taped conversation revealed Andrew Martin's ability to obtain a transcript of a wiretap conversation that he was not entitled to have regarding an ongoing investigation. These allegations taken together with the allegations set forth in the affidavits pertaining to jury selection utilized by Edwin Edwards in the two Edwin Edwards trials conducted in the Eastern District of Louisiana clearly show that these defendants have the capacity, ability and willingness to interfere with the judicial process and witnesses.

FN55. 110 F.3d at 1131.

FN56. 110 F.3d at 1144.

In United States v. Riggio, the Fifth Circuit approved the trial court's consideration of facts indicating that the defendant "had been accused of jury tampering in a previous case" in support of empaneling an anonymous jury. [FN57] Thus, in the Fifth Circuit, a court may consider charges lodged outside of the pending criminal case in determining whether an anonymous jury is warranted. The Court in Riggio also held that evidence adduced at trial may be considered by the appellate court in determining the propriety of the trial court's decision. [FN58]

FN57. 70 F.3d at 338.

FN58. See, Krout, 66 F.3d at 1427 (citing United States v. Wong, 40 F.3d 1347, 1376-77 (2nd Cir.1994)). This is particularly important in this case. As will be seen later in this opinion, the Court's concern about media coverage proved to be a valid concern. Furthermore, the tapes played during the trial also confirmed conclusions reached by the Court when it made the decision to empanel the jury and withhold the names, addresses and places of employment of the jurors.

As noted earlier in this opinion, it is appropriate for the Court to consider the nature of the crimes charged in the indictment. [FN59] The defendants in the present case were accused of being part of a broad-based conspiracy to interfere with *599 the lawful process established by the State of Louisiana for issuance of gaming licenses to operate riverboats in Louisiana. [FN60] All of the defendants except Ecotry Fuller [FN61] were charged as members of a criminal enterprise, the objective of which was to manipulate the lawful licensing process for riverboats in order to enrich themselves and their associates and family members. These allegations support the Court's finding that the defendants had a propensity or willingness to interfere with the lawful state licensing process. The fact that the jury found all of the defendants except Tarver and Fuller guilty of some of these charges only confirms the concern the Court had at the beginning of the trial about the defendants' ability and willingness to interfere with the licensing process.

FN59. Riggio, 70 F.3d at 340.

FN60. Rec.Doc. No. 311 at 3 (Amended Joint Proposed Summary of Indictment) (emphasis supplied).

FN61. Ecotry Fuller and Greg Tarver were acquitted by the jury.

In determining whether to empanel an anonymous jury, the Fifth Circuit has held that the court may also consider the potential that, if convicted, the defendants face lengthy incarceration and substantial monetary penalties. Such is the case pending before the Court. Under the indictment, the defendants were faced with the following maximum sentence of imprisonment and monetary fines and forfeiture: (1) Edwin Edwards: 350 years of imprisonment, a fine of $7,250,000.00, or both; the Court could also impose restitution and/or a forfeiture in the amount of $3,129,000.00; (2) Stephen Edwards: 300 years of imprisonment, a fine of $500,000.00, or both; the Court could

also impose a restitution and/or forfeiture in the amount of $3,129,000.00; (3) Cecil Brown: 80 years of imprisonment, a fine of $1,000,000.00, or both; the Court could also impose a restitution and/or forfeiture in the amount of $2,425,000.00; (4) Andrew Martin: 120 years of imprisonment, a fine of $1,750,000.00, or both; the Court could also impose a restitution and/or forfeiture in the amount of $2,425,000.00; (5) Bobby Johnson: 75 years of imprisonment, a fine of $2,250,000.00, or both; (6) Gregory Tarver: 55 years of imprisonment, a fine of $2,750,000.00, or both; and (7) Ecotry Fuller: 60 years of imprisonment, a fine of $3,000,000.00, or both.

Thus, each defendant at the time the Court issued its original opinion faced substantial terms of imprisonment and staggering penalties and forfeitures. All but two of the defendants continue to face lengthy jail sentences, fines and forfeitures following the jury's verdict. The fact that some defendants were acquitted of all charges and other defendants were found not guilty on some counts does not change the analysis. In Salvatore, the Fifth Circuit held that the relevant inquiry is whether the defendants are initially facing potentially lengthy prison sentences and monumental financial penalties. [FN62]

FN62. 110 F.3d at 1144.

The publicity and the emotional, political climate surrounding the trial are additional factors which the Court may and did consider in determining whether to empanel an anonymous jury. The Fifth Circuit acknowledged the existence of the extensive news coverage in its opinion affirming the Court's gag order in U.S. v. Brown. [FN63] Extensive publicity of these proceedings enhance the possibility that jurors' names would become public, thereby exposing them to possible intimidation and harassment. [FN64] This case has received extensive media coverage before, during and after the trial. This Court entered two standing orders pertaining to media coverage, reserved seating, credentials, a "bull pen" for interviews and reserved parking for media *600

trucks on a closed lane of a public street. [FN65] This Court has outlined in other opinions the extensive procedures the Court was required to put in place to accommodate the numerous local and national media representatives who wanted to attend and cover the trial. The record also reflects the numerous motions filed by the press before, during and after trial seeking the names, addresses and places of employment of jurors. The media has also sought to obtain the juror questionnaires, all in camera hearings pertaining to jurors, and the entire sealed record. Courts have recognized that "[a] trial judge is usually well-aware of the ambience surrounding a criminal trial and the potential for juror apprehensions." [FN66] The Court's decision to withhold juror identifying information " 'requires a trial court to make a sensitive appraisal of the climate surrounding a trial and a prediction as to the potential security or publicity problems that may arise during the proceedings.' " [FN67] The trial judge's assessment is given due deference by the appellate court. The evidence in this case not only reflects the Court's apprehension and concern, but the concern and apprehension of some jurors about being identified publicly.

FN63. See U.S. v. James Harvey Brown, 218 F.3d 415, 427 (5th Cir.2000).

FN64. Salvatore, 110 F.3d at 1143.

FN65. Rec.Doc. Nos. 47 and 292.

FN66. United States v. Eufrasio, 935 F.2d 553, 574 (3rd Cir.1991).

FN67. Branch, 91 F.3d at 723 (citing United States v. Childress, 58 F.3d 693, 702 (D.C.Cir.1995)).

Some background regarding the parties is appropriate and necessary for a full understanding of the facts surrounding media coverage and the emotional, political climate that existed herein.

One of the defendants is Edwin Edwards, a four-term Governor of the State of Louisiana. It is easy to conclude that Edwin Edwards is a powerful, influential figure in Louisiana's political history. As a result, he is and has been the subject of intense media coverage during his political career. The current indictments only increased the media's interest in Edwin Edwards.

In 1985 and 1986, Edwin Edwards was tried in the Eastern District of Louisiana on charges relating to interfering with the lawful process of licensing for nursing homes. The first trial ended in a hung jury. The former governor was acquitted of all charges during the second trial. Both of these trials received national media attention. The indictment in this case and in Brown have also been the subject of intensive media and public interest as indicated by the news clippings set forth in the appendix.

Also named as a defendant in this case is the former governor's son, Stephen Edwards, who has also been the subject of extensive media coverage. Three of the former governor's associates, Andrew Martin, Bobby Johnson and Cecil Brown, are also included in the indictment. Finally, a powerful state senator and a member of the state gaming board were named as defendants. The potential witness list included Eddie DeBartolo, the former president of the San Francisco 49'ers professional football team and Super Bowl champions, and Cleo Fields, a former congressman and current state senator. Witnesses such as these increased the already extensive media attention and pre-trial coverage. This interest increased even more during the trial when Eddie DeBartolo and other members of his staff testified and during the playing of the video tape of a meeting between Senator Fields and Edwin Edwards. Indeed, the media interest continues today and there are now pending before the Court numerous media motions and requests seeking to copy the audio and video tapes played to the jury as well as other evidence, exhibits and pleadings. The media also filed a

mandamus action against the Court in the Fifth Circuit on July 13, 2000 seeking this and other information. [FN68]

FN68. 5th Circuit Docket # 00-30702.

*601 This trial was expected to last three months, but actually took longer because of illnesses of the parties and jurors and other factors. The trial began on January 10, 2000 and a verdict was returned on May 9, 2000. The media coverage was and is as extensive as the Court thought it would be at the time the Court granted the government's motion. "The prospect of intense publicity militates in favor of jury anonymity to prevent exposure of the jurors to intimidation or harassment." [FN69]

FN69. Wong, 40 F.3d at 1377 (citation omitted).

During voir dire, many members of the jury panel expressed concerns about being identified. Many of the jurors who were picked to serve on the jury expressed similar concerns. After the jury returned its verdict, nine of the eleven members of the trial jury [FN70] requested the Court to advise the media that they did not wish to be contacted. [FN71] However, this is only the beginning and not the ending of the story regarding the media coverage of the jurors. When rendering its opinion granting the government's motion to empanel an anonymous jury, the Court was concerned about juror apprehension, intimidation and harassment by the media and other persons who were not even directly involved in the case, but who had strong feelings for or against parties and the charges.

FN70. One juror was excused during deliberations. Under Rule 23 of the Federal Rules of Criminal Procedure, the jury was allowed to continue its deliberations with eleven jurors.

FN71. Rec.Doc. No. 1350.

In addition to concerns about the media coverage, other events involving third parties and their contacts with the jurors or allegations which occurred during the trial support the Court's decision herein. Despite the anonymity ordered by the Court, the media, upon learning the name of one juror, published the juror's name in the newspaper. [FN72] It seems highly likely that if the jurors were not given anonymity, there would have been widespread dissemination of their names, addresses and places of employment, thereby subjecting them to possible harassment or intimidation from the media and others. Indeed, this very thing happened during the trial as will be discussed later. The Court can only wonder what additional problems the Court and the jurors would have had if the names, addresses and places of employment of the jurors were made public. Following are a few examples of the problems the Court faced despite the numerous precautions taken by the Court.

FN72. The juror's name was known because he was employed as a reporter by that newspaper.

For the convenience and protection of the jurors, the jurors reported to a location away from the courthouse where United States Marshals picked up the jurors and transported them to and from the courthouse each day. This procedure did not deter the press from attempting to locate where the jurors were parking their cars or from attempting to identify jurors presumably by obtaining their identity from license plate numbers on the jurors' cars. Some members of the media discovered the location where the jurors met and attempted to video tape and talk to some of the jurors. After the jury's verdict on the guilt and innocence phase of the trial, but prior to the final verdict on the issue of forfeiture and their discharge as jurors, some members of the media appeared at the homes of jurors to interview jurors presumably about their verdict.

During the voir dire, each juror was questioned individually in open court with the parties, public and media present.

Newspaper articles were published about the answers given by the jurors. These detailed answers caused some jurors to be identified by co-workers, friends and others even though their names and places of employment were withheld from the parties, media and public. Jurors were also required to give their opinions about Edwin Edwards and the other defendants, *602 gambling, wiretaps, use of informants, plea bargains and people who dealt in large sums of cash. It was important for this jury to be able to express honest opinions about these and other questions without being concerned about harassment or other contact from the media or any other person. There was little, if anything the Court could do to prevent certain stories from being published. For example, although sealed to protect their identity, a list of 61 unindicted co-conspirators was published and widely disseminated by the media. [FN73] The Court's gag order did not seem to deter the press from seeking interviews of the defendants, attorneys or witnesses. This is not a criticism of the media's desire and right to cover this case in accordance with the rights guaranteed to the press under the Constitution and jurisprudence. It is, however, justification for trying to protect the identity of the jurors and free them from being questioned, harassed or otherwise bothered and intimidated during and after this lengthy trial.

FN73. The Court has been unable to determine how and from whom the reporter obtained this sealed document.

The Court also believed it was important to shield the jurors from improper contact, harassment and possible influence from the general public and others. A cursory review of the answers given by the prospective jurors to questions set forth in the juror questionnaire reveals a good sample of the public's feelings about the parties and charges brought against the defendants. The emotional, political atmosphere that surrounded this case could not be avoided. No juror serving in a case where there is such high public interest as this case should have to be concerned about being contacted, influenced or harassed by the general

public or anyone else. The Court concedes that not every case where there is extensive media interest justifies or requires an anonymous jury. But when, as in this case, a totality of the facts suggest the potential that the jurors will be exposed to intense media coverage that could lead to possible intimidation and harassment, an anonymous jury is necessary.

Despite the best efforts of the Court and the United States Marshal's Service, some individuals did attempt to cause problems for some jurors because of personal bias against a juror, personal relationships with the parties and other reasons. This caused the Court to conduct several hearings which required the jurors and in some cases, their families, to be questioned by the Court. The Court believes that the use of the anonymous jury prevented more of this type of conduct. The Court's decision to withhold the jurors' identities allowed the jury to concentrate on the evidence and proved to be a substantial deterrent to intentional or accidental contact and influence on the jury. This protection also lessened the prejudice which could arise from such actions, innocent though they may appear. The Court's action also ensured all of the parties a fair and impartial trial.

The Court cannot overlook the emotional, political atmosphere that surrounded this case. As noted earlier, Edwin W. Edwards was a four-term governor of Louisiana. A state senator and a member of the state gaming board were also named as defendants. Witnesses included a mayor, chairman of the gaming board and members of the former governor's staff. The potential witness list included many current and former political appointees and state employees. To "minimize the prejudicial effects of the pretrial publicity surrounding this trial and an emotional, political atmosphere that created a risk of jury intimidation and improper influence," [FN74] the Court withheld the names, addresses and places of employment of the jurors. The Court does not believe there were any other alternatives under the totality *603 of the facts in this case. The

Sixth Circuit upheld similar action taken by the trial judge in U.S. v. Dakota, [FN75] The totality of the facts of this case create a similar, if not greater need for the Court's action than those set forth in Dakota.

FN74. United States v. Dakota, 188 F.3d 663, 668 (6th Cir.1999).

FN75. 188 F.3d at 663.

Certain defendants have argued that because the government's evidence in support of an anonymous jury did not pertain to all of the defendants, [FN76] it would be unfair and prejudicial to require an anonymous jury for all of the defendants. This argument is without merit. The defendants are incorrect in their assessment of the evidence and the jurisprudence which the Court followed in reaching its decision. Furthermore, defendants' argument was rejected in United States v. Ross. [FN77] In Ross, the Eleventh Circuit stated that "[e]ven though the government did not prove that these incidents were related to Appellant or another co-conspirator, the court nevertheless properly considered them in establishing an anonymous jury." [FN78] What the defendants fail to acknowledge is the fact that six of the seven defendants in this case are charged as members of a criminal enterprise to manipulate the lawful state licensing process in order to enrich themselves and others via extortionate activities. Some of the alleged objectives of the enterprise include actions of the defendants: (1) to enrich the members of the enterprise as well as their associates, friends, families, and partners, through the illegal manipulation and corruption of the lawful system to award riverboat gaming licenses, in order to ensure that licenses would be awarded to those applicants supported by the enterprise; (2) to enrich the members of the enterprise [and related others] by extorting payments from riverboat license applicants, thus manipulating the lawful licensing process; (3) to enrich the members of the enterprise [and related others] by ensuring that the gaming operations

benefitting Edwin Edwards and the members of the enterprise would not be economically harmed or otherwise affected by adverse political action; (4) to secretly divide and launder the proceeds of the enterprise's racketeering activity; (5) to implement any means deemed necessary, including using, endeavoring to use, and procuring other persons to use illegal electronic wiretaps to intercept telephone communications of government agents and prosecutors, in order to corruptly formulate defenses and countermeasures to the government's investigation of the enterprise. [FN79] It is clear that the Court may consider the evidence pertaining to one co-conspirator against the other co-conspirators and members of the criminal enterprise when deciding whether to empanel an anonymous jury.

FN76. There is evidence relating directly to defendants Edwin Edwards, Stephen Edwards and Andrew Martin. There is also evidence related directly to persons associated with the defendants in this case.

FN77. 33 F.3d 1507 (11th Cir.1994).

FN78. 33 F.3d at 1521 n. 25 (citation omitted).

FN79. Rec.Doc. No. 306, pp. 8-10.

While Ecotry Fuller is not alleged to have been a member of the aforementioned criminal enterprise, he was charged in this case with perjury before a federal grand jury regarding his statements about the executive summary. The allegation that Mr. Fuller made false statements to a grand jury while under oath is indicative of a willingness to subvert the lawful judicial process.

It is also obvious that neither Gregory Tarver nor Ecotry Fuller were prejudiced by the Court's decision to grant the government's motion. Both were found not guilty on all charges brought against them. Furthermore, not guilty verdicts were returned on

other charges and racketeering acts brought against some of the other defendants. It is clear that the jury gave very careful consideration to all of the evidence brought against each defendant and based their verdicts on the evidence *604 and not the fact that their names had not been disclosed. There was never any indication or suggestion made to the jury by the Court or any attorney involved in the case that the defendants were violent or dangerous. The Court's charge mentioned elsewhere in this opinion dispelled any suggestion that names of jurors were withheld because the defendants might physically harm the jurors or their families. The fact that numbers instead of names were used by the jurors did not prejudice the defendants or interfere with the jury's ability to fairly and impartially render a proper verdict herein. [FN80]

FN80. This is particularly so given the substantial information given to parties about the jurors.

Judge Edith Brown Clement's decision in United States v. Carollo [FN81] supports the Court's decision to empanel an anonymous jury even when some of the evidence presented in support thereof does not directly relate to every defendant. After Judge Clement determined that the jury in Carollo would be anonymous, a number of the defendants moved for separate trials. These defendants argued that they would be unfairly prejudiced by the "decision because the jury will assume that all of the defendants are dangerous, whereas in reality the Court's decision to empanel an anonymous jury was based on the histories of only a few defendants." [FN82] The Court refused to grant separate trials, finding that the prejudice feared by the defendants could be cured by limiting instructions to the jury. This Court gave similar limiting instructions to the jury. Because of the verdicts rendered by the jury, it is obvious that the jury not only followed these instructions, but actually returned not guilty verdicts on all charges brought against two of the parties who were complaining of prejudice. The jury also found Edwin W. Edwards and Stephen Edwards not guilty on some

charges and racketeering acts. It is apparent that the jury followed the Court's limiting instructions on why numbers were used instead of names.

FN81. No. 94-158, 1995 WL 591322 at *2 (E.D.La. Aug.28, 1995) (not reported in F.Supp.) (court empaneled an anonymous jury where the backgrounds of some of the defendants necessitated it, while the backgrounds of others did not).

FN82. 1995 WL 591322 at *1.

[5] There is a consensus among all circuits that have considered the anonymous jury issue that once the decision to empanel an anonymous jury is made, the trial court must take appropriate action to ensure the parties are given adequate voir dire to allow the parties to have sufficient information to meaningfully exercise their challenges. The focus of the inquiry is whether the defendants were prejudiced in selecting an impartial jury because relevant and meaningful information was withheld from them. A common sense reading of the jurisprudence indicates that the mere disclosure of the name of a person is not particularly enlightening insofar as gleaning information about the biases, beliefs, prejudices and values of that person. As the record will reveal, the parties were provided with extensive information about each juror. There were only three things the parties did not know: the juror's name, specific address and specific place of employment. However, the parties did know in which parish and what zip code each juror currently lived and a history of prior places where the juror lived. The parties were also provided with extensive information about the juror's current and prior employment history. This information provided to the parties will be discussed in detail later in this opinion and it is also indicated on the juror questionnaire which is attached as an exhibit in the appendix of this opinion. Numerous courts have upheld a trial court's decision to empanel an anonymous jury when extensive voir dire and answers to questionnaires are provided. The thrust of the inquiry is whether

"measures are taken to inform a defendant of jury *605 demographics and to permit ample voir dire," [FN83] so that a defendant's right to intelligently exercise peremptory challenges is not impaired. In United States v. Branch, [FN84] the Fifth Circuit held that there was no showing that refusing to release the names and addresses of the jury prejudiced the defendants' ability to select an impartial jury. [FN85] The defendants in Branch were furnished with answers to 80 detailed questions submitted to prospective jurors. [FN86]

FN83. Eufrasio, 935 F.2d at 574 (citing Scarfo, 850 F.2d at 1015).

FN84. 91 F.3d at 699.

FN85. 91 F.3d at 724.

FN86. See also, Eufrasio, 935 F.2d at 574 (anonymous jury is justified as long as defendants are afforded full voir dire); Paccione, 949 F.2d at 1192 (when anonymous jury is warranted, the defendant's fundamental right to an unbiased jury is adequately protected by the court's conduct of a voir dire designed to uncover bias as to issues in the cases and as to the defendant himself); United States v. Edmond, 52 F.3d 1080, 1082 (D.C.Cir.1995) (voir dire was more than adequate to compensate for the information denied by juror anonymity; it elicited information about the prospective jurors' habits, activities, work experiences, and families that was far more extensive and detailed than appellants might have drawn from jurors' mere names and addresses); Wong, 40 F.3d at 1377 (despite withholding of jurors' names, addresses, and employers, the court questioned prospective jurors about their familiarity with the case, the defendants and the crime scenes, and inquired about their neighborhoods, marital status, employment, spouse's and children's employment, education, organizational affiliations, ethnicity, military service, and other matters; this "extensive voir dire adequately explored prospective jurors' bias" as to issues in

the case and as to the defendants and "was more than sufficient to enable the defendants to exercise their challenges meaningfully, and to obtain a fair and impartial jury."); United States v. Crockett, 979 F.2d 1204 (7th Cir.1992) (names, addresses, and places of employment withheld, but district court conducted a "searching and thorough" voir dire).

[6] In the present case, the parties were provided with an "arsenal of information" based upon the extensive questionnaires completed by potential jurors, as well as the Court's individual voir dire of potential jurors. Specifically, the parties were provided with answers to 116 detailed questions submitted to prospective jurors. [FN87] The final questionnaire utilized by the Court was compiled from questions submitted jointly by the parties. Copies of the completed questionnaires prepared by the 125 jurors who were summonsed for the trial were given to the parties several days prior to jury selection. This allowed the parties ample time to review the completed questionnaires. [FN88] The government and the defendants also submitted follow-up questions they wished the Court to ask during individual voir dire. But for the name, address and place of employment, the parties were provided with a wealth of information as to each potential juror. This included information about the age, race, medical problems, economic and other hardships, residential history, [FN89] family history and marital status, number of children, current employment status, occupation, nature of the employer's business, length of employment, size of company where the juror worked, prior jobs, training and employment for federal, state or local governments, training in business, financial or accounting, prior business investments and whether the juror's employer ever did business with the state. The questionnaire also provided information regarding the juror's education, military experience and background information regarding the juror's spouse or partner. The jurors also provided information about their activities, including volunteer work, involvement in education, religious, professional, *606 political, or other union groups, and any

leadership positions held. Jurors were required to disclose their political party affiliation and whether they considered themselves liberal, conservative, moderate or some other status. The jurors disclosed whether they or any member of their family had run, been elected or appointed to public office, had contributed to or made gifts to political candidates or campaigns or worked in such campaigns. In addition to the above, the questionnaire required each juror to state how closely they followed Louisiana politics. Jurors set forth their religion, how often they attended church and whether there were any religious beliefs which prevented them from serving as a juror. Questions 57-71 asked jurors detailed information about gambling in Louisiana, religious beliefs regarding gambling and other knowledge about gambling laws, regulations, corruption in awarding riverboat licenses, any responsibility Edwin Edwards may have had for problems in the state gaming industry and opinions about people who deal in large sums of cash. Detailed questions were asked each juror about their prior jury service and their opinions of the court system. [FN90] Included in the questions about the court system were questions seeking the juror's opinions about plea agreements, use of informants, immunity and reduced sentences.

FN87. A copy of the questionnaire is attached hereto.

FN88. Because Edwin Edwards was hospitalized during jury selection, the parties had additional time to study the completed questionnaires.

FN89. This included information whether the juror owned or rented a home or lived with others and how long and where in Louisiana the juror lived.

FN90. Questions 72-85.

There were extensive questions directed to the jurors regarding any connections they had with the parties, attorneys and agents in this case. Questions were also asked about the media and

pretrial publicity, opinions of jurors on the guilt or innocence of the defendants, the defendants' presumption of innocence and right to remain silent, the government's burden of proof beyond a reasonable doubt and the juror's obligation to follow the law as given by the judge. Finally, questions were asked of each juror whether they could serve in a fair and impartial manner. As will be noted later, jurors were then individually questioned during voir dire about the answers they gave in the questionnaire.

The Court summoned 125 jurors to appear on the first day of the trial. The Court began the voir dire by asking questions to the entire jury panel in a group after the jurors had been placed under oath. Then individual voir dire was conducted on each juror outside the presence of the other jurors. The parties were allowed to exhaust every appropriate question relevant to this case either via the written questionnaire and by suggesting questions during the voir dire process. The transcript of voir dire will consist of approximately 2,000 pages. [FN91] The Court took eight days to actually empanel the jury. After all questions were asked of the jurors, the Court allowed the parties considerable time to again review the questionnaires and the answers given by the jurors during voir dire before requiring the parties to exercise their challenges. A review of the answers given during voir dire and the answers to the juror questionnaires reveals the parties had more than ample information to use in deciding which jurors to select, challenge for cause or peremptorily strike. In short, the information provided to the United States and the defendants was far more extensive and detailed than the parties could have obtained by just knowing the name, address and place of employment of a juror. The information obtained from the questionnaire and the voir dire adequately explained any bias or prejudice a juror may have had against a defendant, the government, and on the issues involved in the case. This information permitted the parties, including the defendants, to meaningfully exercise their challenges and to obtain a fair, honest and impartial jury. The defendants' fundamental right to an unbiased jury was adequately protected

by the *607 procedure used by the Court and the information provided by each juror.

FN91. Only 80 jurors were questioned individually before the Court obtained a sufficient pool to select the jury.

[7] This Court was cognizant of the defendants' constitutional rights to a presumption of innocence until proven guilty beyond a reasonable doubt. The Court was also aware that a neutral, plausible and nonprejudicial reason for anonymity must be provided to the jurors. Depending upon the particular case, these instructions should ordinarily include some of the following: (1) defendants are entitled to a presumption of innocence; (2) the case is one of high profile; (3) the jurors are to remain anonymous because of the publicity surrounding the case and the need to shield jurors from the possibility of extrajudicial communications; [FN92] (4) use of an anonymous jury ensures that there will be a fair trial for both sides; [FN93] (5) empaneling an anonymous jury in no way suggests that improper communications have been made by either side; [FN94] and (6) it is common practice in many cases in federal court to keep the names and identities of the jurors in confidence. [FN95]

FN92. United States v. DeLuca, 137 F.3d 24, 32 (1st Cir.1998).

FN93. Salvatore, 110 F.3d at 1144.

FN94. Salvatore, 110 F.3d at 1144.

FN95. Edmond, 52 F.3d at 1093.

The jurors in the present case were provided with neutral, nonprejudicial reasons for the Court's decision in order to protect the defendants' constitutional right to a fair trial. The Court gave the following instruction to the jury:

You have been randomly selected to serve as a potential juror in the trial of United States versus Edwin W. Edwards, Stephen Edwards, Bobby Johnson, Andrew Martin, Cecil Brown, Gregory Tarver and Ecotry Fuller.

This case has attracted a high degree of publicity. To protect your privacy during the jury selection process and trial, you have been assigned an individual juror number which will be used to identify you. You must use your juror number at all times. This procedure has been followed in other highly publicized cases in federal court and is designed to protect the privacy of jurors during the course of the trial.

With any potentially high profile case, we are all subject to receiving phone calls and letters about the case and even inquiries from members of the media or from friends, neighbors or relatives. I want to ensure that there not be any such contact with members of the jury during the course of this trial. I also want to protect the defendants as well as the government from any belief on the part of the jury that any such communications are coming from one side or the other. In other words, I do not want the defendants or the government to be characterized as anyone who would be sending communications to the jury or as someone who is trying to improperly influence the jury.

The use of these procedures is to ensure that both sides will get a fair trial. It will also permit you the jury to perform your important duties without your privacy being invaded.

You are also to remember that the defendants have entered not guilty pleas to the charges brought against them. Therefore, they are presumed innocent unless and until the government proves their guilt beyond a reasonable doubt. Therefore, as we proceed today and throughout the remaining days of this trial, you should only use your juror number to identify yourself. Do not use your or your spouse's name, home or business address or the name or address of your employers in responding to questions or otherwise communicating with the Court.

Are there any members of the jury who would have any bias, prejudice or negative feelings toward the United States or the defendants because of the *608 Court's decision not to reveal

your names to the public?

All jurors assured the Court that they had no bias, prejudice or negative feelings toward the United States or the defendants because of the use of an anonymous jury. In addition to giving the quoted charge, the Court set forth the following language in the first questionnaire submitted to the prospective jurors:

This case has attracted a high degree of publicity. To protect your privacy during the jury selection process and trial, you have been assigned an individual juror number which will be used to identify you. Your juror number is located in the top right-hand corner of the first page of the attached juror questionnaire and on each page thereafter. The procedure used in this case has been followed in highly publicized cases and is designed to protect the privacy of jurors during the course of the trial.

Defendants argue that empaneling an anonymous jury in this case effectively establishes a new category of cases appropriate for that procedure. The Court disagrees. As noted earlier in this opinion, the Fifth Circuit in United States v. Branch [FN96] upheld impalement of an anonymous jury despite the fact that the defendants had no "ties to organized crime." After carefully considering the totality of the circumstances in this case, the Court concludes that empaneling an anonymous jury was necessary to protect the lawful administration of justice, ensure all parties a fair and impartial trial, protect the privacy of the jurors and protect the jurors from undue harassment, intimidation, and inquiries.

FN96. See, Branch, 91 F.3d 699.

This is not the first case where a court has empaneled an anonymous jury where the defendants had no ties to organized crime. In United States v. Branch, [FN97] United States v. Talley [FN98] and United States v. Dakota [FN99] the appellate court affirmed the impalement of an anonymous jury even though links to organized crime were absent. In fact, if there

was a specific requirement that organized crime be present before the courts can approve an anonymous jury, the appellate courts would have clearly stated such. The Branch decision has been previously cited and discussed herein. In United States v. Talley, there was no evidence of any involvement by the defendant in a "criminal organization that included a pattern of violence," nor was there evidence that Talley had ever attempted to tamper with any previous juries. [FN100] There was evidence, however, of Talley's dangerous propensities to do so. The Court also believed that Talley's "many years of law enforcement experience provided him with the types of contacts that would enable him to tamper with the jury." [FN101] In the present case, it is clear that Edwin Edwards' sixteen years of service as Governor of Louisiana have provided him with similar kinds of contacts. [FN102] This fact is borne out by the affidavits submitted in conjunction with the anonymous jury issue regarding the manner in which the juries were selected during the 1985 and 1986 trials of Edwin *609 Edwards. [FN103] It appears that co- workers or fellow union members of potential jurors were contacted. [FN104] According to the affidavits, the jury selection and research process was "organized and efficient" and involved more than 100 close supporters of the former governor. Political operatives contacted friends, neighbors and co- workers of potential jurors. Research on the jurors continued during the course of the trial. There is some indication that a sheriff and some of his associates may have assisted in the jury selection process. [FN105] Additionally, FBI Agent Hultz interviewed Colonel Paul Fontenot, who was the primary trooper in charge of guarding Edwin Edwards during the 1985 and 1986 trials. According to Agent Hultz, Colonel Fontenot, who was later named Commandant of the Louisiana State Police by Edwin Edwards, stated that during the previous trials, he was requested by members of Edwin Edwards' staff to perform records and license plate checks on various persons. Colonel Fontenot further stated that since the 1985 and 1986 trials, Stephen Edwards has requested him to perform background checks on various persons.

FN97. 91 F.3d at 699.

FN98. 164 F.3d 989 (6th Cir.1999).

FN99. 188 F.3d 663 (6th Cir.1999).

FN100. 164 F.3d 989, 1002. (6th Cir.1999)

FN101. 164 F.3d at 1002.

FN102. The court in Talley further found that the defendant's current charge of attempting to kill an F.B.I. agent in his case snd a witness indicated that he had "already attempted to affect the judicial process." Although Mr. Edwards is not charged with attempting to kill an F.B.I. agent, he is charged with illegal wiretapping and counter surveillance of an F.B.I. agent in this case--evidence that he attempted to tamper with the lawful judicial process. He is also charged in United States v. Brown with tampering with a witness and bribing a judge.

FN103. Rec.Doc. No. 1446.

FN104. Rec.Doc. No. 975.

FN105. Rec.Doc. No. 1449.

The statements contained in the affidavits submitted by all of the parties indicate the extensive resources which were and are available to Edwin Edwards to obtain information about jurors. It is also clear that during the prior trials, the defense team continued to receive information about the sitting jurors during the course of the trials. The defendants submitted some clarifying affidavits from some of the same persons from whom the FBI took statements. It is not necessary for the Court to resolve this conflict in the affidavits to a certainty. This evidence when combined with the other evidence considered by the Court strongly supports the Court's decision to withhold the

names, addresses and places of employment of the jurors.

This Court can understand the need for gathering information about potential jurors in accordance with the local rules of court and the Federal Rules of Criminal Procedure to assist counsel in the selection of the jurors. However, once the trial jurors are seated, continuing research of the jurors creates the potential for prejudicial communications, innocent or otherwise, with a juror or a friend, family member or co-worker of a juror. Such contacts, though innocent in nature, can unduly influence a juror's decision. It is precisely this kind of communication, contact or influence which the Court in this case wished to avoid.

CONCLUSION

It is important to note that the Court did not just rely on the affidavits submitted with the motion to support its decision to withhold the name, address and place of employment from the parties, media and public. The Court also considered: (1) the nature of the charges pending in this case and in Brown; (2) the defendants' past attempts to interfere with the judicial process or witnesses; (3) the potential lengthy jail sentences and substantial monetary penalties the defendants were facing, if convicted; (4) the extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation, influence and harassment; (5) the potential and actual contact by the media and other individuals with members of the jury panel while the trial was being held; (6) the emotional, political atmosphere of this case; (7) juror apprehension about being identified or interviewed; and (8) the totality of the circumstances in this case.

The Court believes that empaneling an anonymous jury was the only manner in which the Court could ensure that the jurors in this case were protected from outside influence and intimidation from *610 persons associated with the government, the defendants, the media, and individuals who had an interest for or

against any of the parties or the jurors in this case.

The totality of all of the circumstances in this case establish a clear and actual need to withhold the names, addresses and places of employment of the jurors. The evidence which supports the Court's decision was clear at the time the Court made its initial decision to withhold the names, addresses and places of employment from the parties. The evidence presented at the trial, the media's actions and other events which occurred during and after the trial established an absolute need for a "partially anonymous jury" in this case.

The answers given by the jurors to the questionnaire and to questions asked during the voir dire gave the parties more than sufficient information for the parties to make an informed decision on which jurors to accept, challenge for cause or peremptorily challenge.

The jury was properly instructed by the Court why their names, addresses and places of employment were withheld. Finally, the jury's verdict shows these parties were not prejudiced because numbers instead of names were used by the jurors.

For these reasons, the motion of the United States for an anonymous jury is and was GRANTED.

APPENDIX A

Juror No. _____

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA
CHIEF JUDGE FRANK J. POLOZOLA

UNITED STATES OF AMERICA
CRIMINAL ACTION
VERUS NUMBER
98-165-B-M2
EDWIN W. EDWARDS, STEPHEN EDWARDS
CECIL BROWN, ANDREW MARTIN,
GREGORY TARVER, BOBBY JOHNSON,
ECOTRY FULLER

JUROR QUESTIONNAIRE

In order to speed up the process of jury selection, a juror questionnaire has been prepared for you to complete. These questions should be answered byyou and returned to the Clerk of the United States District Court for the Middle District of Louisiana in the enclosed envelope. A response is required by December 17, 1999. Do not place your name, address or place of employment anywhere on this questionnaire. Your name, address or place of employment should only be placed on the cover sheet attached to the questionnaire. Please place your signature on the cover sheet. Your answers will have the effect of a statement made under oath.

The questionnaire is designed to obtain information about your background as it relates to your possible service as a juror in this case. Its use will avoid the necessity of asking each prospective juror every one of these questions in open court, thereby substantially shortening the jury selection process.

All information contained in this questionnaire will be kept confidential. It will be reviewed only by the Court and by the

attorneys on each side. Neither your identities nor your answers will be released to the general public or the media. You will be identified at trial only by your juror number.

Respond to each question as fully and completely as possible. Your complete candor and honesty is necessary so that both the prosecution and the defense will have a meaningful opportunity to select an appropriate jury. Your cooperation is of vital importance.

Because the questionnaire is part of the jury selection process, the questionnaires are to be answered under your oath as a prospective juror to tell the truth. You are instructed not to discuss this case or the questionnaire with anyone, including your family, friends, co-workers and fellow jurors. You must complete the questionnaire yourself without consulting, talking to or seeking assistance from anyone.

If you require additional space for your response or wish to make further comments regarding any of your answers, please use the additional blank pages attached to the back of your questionnaire. Please identify by number the question you are responding to on the blank page.

Please keep in mind that there are no "right" or "wrong" answers. Your answers will assist the Court and the parties in selecting an appropriate jury.

Please fill out the entire questionnaire. Do not leave any questions blank. If you are unable to answer a question or do not understand the question, please answer "do not know" or "do not understand" in the space after the question.

PLEASE WRITE OR PRINT LEGIBLY. IF YOUR ANSWERS ARE ILLEGIBLE, YOU WILL BE REQUIRED TO RE-COPY YOUR ANSWERS.

Thank you for your full cooperation. It is of vital importance to the Court that you return your completed questionnaire by DECEMBER 17, 1999.

1. Age: _____

2. Gender: _____Male _____Female

3. What is your race?
   ____ White
   ____ Hispanic/Latino
   ____ Black/African-American
   ____ Asian
   ____ Native American
   Other:_____

4. Do you have any difficulty reading, speaking, or understanding the English language?
   Yes ____ No ____

5. Do you speak or understand any languages in addition to English?
   ____ Yes What language(s):_____
   ____ No

6. Do you have:

Any difficulty hearing	Yes ____ No ____
Any difficulty seeing	Yes ____ No ____
Primary responsibility for a young child, a disabled or elderly relative	Yes ____ No ____
Regular doctor's appointments for a chronic health problem	Yes ____ No ____

IF YES, please briefly explain: _____

7. Are you taking any medication on a regular basis? Yes ____ No ____

IF YES, which ones: _____

Please answer the following questions even if the Court has previously denied your request to be excused for hardship reasons. The Court will reconsider any request to be excused for hardship reasons.

8. The Court estimates that the trial of this case may last 2-3 months. Do you have any personal problems or medical condition(s) which could affect your ability to serve as a juror in a trial of this length?

Yes ____ No ____

IF YES, please state the nature of the problem(s): _____

_____

_____

9. Jury service is one of the highest duties and privileges of a citizen of the United States. Mere inconvenience or the usual financial hardships of jury service will be insufficient to excuse a prospective juror. Jurors are paid $40.00 per day plus mileage expenses. Do you wish to apply to the Court to be excused on the ground that jury service would be a serious hardship?

Yes ____ No ____

IF YES, please briefly explain the hardship: _____

_____

_____

10. Is there anything else of a personal or professional nature that might make it difficult for you to concentrate on this trial?

Yes ____ No ____

IF YES, please explain: _____

Residential History

11. City of residence: _____ Zip Code: _____

12. Do you: (check one)
____ Own your home
____ Rent your home
____ Live with other homeowners
____ Live with relatives, if so state relationship:_____

13. How long have you lived in Louisiana? _____ years
Where else have you lived in Louisiana, and how long did you live there?

_____

_____

14. Please list the places outside Louisiana where you have lived and how long
you have lived there:

_____

_____

15. Where were you born? _____

Background/Family History

In answering questions 16-31 do not give the name or address of any employer or employer's business. If a question asks about an occupation, only provide a general description about the nature of that occupation. (For example: construction, A/C, plumbing, government, etc.)

16. Marital status: (check one)
____ Single (never married)
____ Living with a partner for ____ years
____ Married for ____ years
____ Separated for ____ years; married for ____ years

____ Divorced for ____ years; married for ____ years
____ Widowed for ____ years; married for ____ years

17. If you have children, stepchildren or grandchildren, please list: (do NOT list names)

Relationship	Age	Education	Occupation	Does he/she live with you?

Employment

18. Current employment status (check any and all that apply):
____ Self-employed
____ Work full-time
____ Work part-time
____ Homemaker for ____ years
____ Student for ____ years
____ Disabled and unable to work for ___ years or ____ months
____ Unemployed/laid off for ____ years or ____ months
____ Retired for ____ years
____ Other: _____

19. What is or was your occupation? (If you are retired, unemployed, homemaker, or disabled, what was your last job?) Do NOT list name of employer or name of employer's business.

_____

20. What are (were) your main responsibilities on your most recent job?

_____
_____
_____

21. Please state the nature of your current or last employer's business (e.g. construction, A/C, plumbing, government, etc.) Do NOT list name of employer or name of employer's business.

_____

22. Length of employment at current or last job: ____ (years) (months)

23. Do you work for a:

____ Small company (Less than 50 employees)
____ Large company (50 employees or more)
____ Self-employed Company name: _____
____ Government agency--Specify: _____
____ Other: _____

24. How satisfied are you with your current work situation?

____ Very satisfied
____ Somewhat satisfied
____ Somewhat dissatisfied
____ Very dissatisfied
____ Not working

25. Have you ever been laid off? Yes ____ No ____
IF YES, please explain: _____

_____

26. Do you supervise other people? Yes ____ No ____
If yes, how many? _____
Did you hire/fire others? Yes ____ No ____

Describe your responsibilities: _____

_____

27. Whether or not you are currently employed, please complete the following information for previous jobs and employers: (Do NOT include current job and Do NOT list name of employer or name of employer's business.)

Job Title or Kind of Work Length

_____

_____

_____

_____

28. Have you or anyone in your family ever had training or employment in the following:

Federal government	Yes ____ No ____
Internal Revenue Service	Yes ____ No ____
State government or legislature	Yes ____ No ____
Local government	Yes ____ No ____
Law enforcement (local, state, or federal)	Yes ____ No ____
Court system (local, state, or federal)	Yes ____ No ____
Law or law office	Yes ____ No ____
Gaming industry	Yes ____ No ____

IF YES TO ANY OF THE ABOVE, please explain whether this is yourself or a relative, courses or job(s) held, and dates of employment: D

_____

_____

_____

29. Have you taken any courses or had training in business, finance, or
accounting?

Yes ____ No ____

Please explain: _____

30. Have you ever owned or invested in a business?

Yes ____ No ____

a. Are you still operating the business?

Yes ____ No ____

IF NO, why not? _____

_____

b. Please describe the business but do not give the name:

_____

_____

c. Was this experience: (check one) ____ positive ____ negative ____
mixed

Please explain: _____

_____

31. Have you or your employer ever done business or sought to do business with any state government agency?

Yes ____ No ____

IF YES, please explain: _____

_____

_____

a. Were you or your employer treated fairly by the state agency?

Yes ____ No ____

b. Was this experience: (check one) __ positive __ negative ____ mixed

Please explain:_____

_____

Education

32. What is the highest grade or degree you completed in school? _____

If more than high school, please fill in below:

Dates Area(s) of study/training Degree/Certificate

_____

_____

33. When you were in school, what was your:

Favorite Subject Least Favorite Subject

_____ _____

_____ _____

Military

34. Have you ever been in the military?

Yes ____ No ____

IF YES, which branch? What was your rank and dates of service, and what type of discharge did you receive?

_____

_____

If you served in the military, please describe the types of jobs you had, any special training, including law enforcement or military courts, and the types of skills you acquired.

_____

_____

Your Spouse or Partner's Background

Please complete all of the following questions regarding your present spouse or non-married partner. If you are widowed, divorced, or separated, please complete all the following questions regarding your former spouse or partner.

35. What is your spouse's or partner's age? _____

36. Spouse or partner's current employment status (check any and all that apply):

____ Self-employed
____ Work full-time
____ Work part-time
____ Homemaker for _____ years
____ Student for ____ years
____ Disabled and unable to work for ____ years or _____ months
____ Unemployed for years _____ or months _____
____ Retired for _____ years
____ Other: _____

37. What is or was your spouse or partner's occupation? (If he/she is retired, unemployed, homemaker, or disabled, what was their last job?) Do NOT list name of employer or name of employer's business.

_____

38. What are (or were) your spouse or partner's duties and responsibilities:

_____
_____

39. List the nature of your spouse or partner's current or last employer(s)' business (e.g., construction, plumbing, government, etc.). Do NOT list name of employer or name of employer's business.

_____

_____

40. Length of spouse/partner's employment at current or last job:
_____ years

41. What other types of work has he/she done?

_____

_____

42. Was your spouse/partner ever laid off? Yes ____ No ____

IF YES, please explain: _____

_____

43. What is the last grade or degree your spouse or partner completed in school?

_____

If more than high school, please fill in below:

Dates Area(s) of study/training Degree/Certificate

_____

_____

Activities

44. Have you ever done any volunteer work?

Yes ____ No ____

IF YES, please describe: _____

_____

45. Have you or your family been involved in any organizations, such as

educational, religious, professional or political groups?

Yes ____ No ____

IF YES, please explain: _____

_____

46. Have you or has your spouse/partner ever belonged to a union?

Yes ____ No ____

IF YES, who: Self _____ Spouse/Partner _____

Dates of Membership: Self ___ to __ Spouse/Partner ___ to ___

47. Have you ever held a leadership position in any organization?

Yes ____ No ____

IF YES, please list the leadership positions you have held: _____

_____

48. In terms of political party affiliation, are you a:

____ Democrat
____ Republican
____ Independent
____ Libertarian
____ Other: _____
____ None

49. Do you consider yourself to be politically:

____ Extremely Liberal
____ Liberal
____ Moderate
____ Conservative
____ Extremely Conservative
____ None of the above

50. Have you, or anyone close to you, ever run for, been appointed or been elected to serve in any public office or governing board, such as a school board or police jury?

Yes ____ No ____

IF YES, please explain: _____

_____

51. Have you ever given a gift to a public official or contributed money or made a loan to a political candidate or campaign?

Yes ____ No ____

IF YES, please explain: _____

_____

52. Have you ever worked in the field of politics or donated your time to work on the campaign of a political candidate?

Yes ____ No ____

IF YES, please explain: _____

_____

53. How closely would you say you follow Louisiana state politics?

____ Follow very closely
____ Follow somewhat closely
____ Follow rarely
____ Do not follow at all

54. What is your religion?

____ No preference
____ Baptist
____ Protestant
____ Catholic
____ Jewish
____ Other: _____

55. Approximately how often do you attend church or religious services?

____ Never
____ Rarely
____ Several times a year
____ Once a month
____ Several times a month
____ Once a week
____ Several times a week

56. Is there anything in your religion or personal beliefs which would prevent you from sitting as a juror, in judgment of the guilt or innocence of another person, or following the law given to you by the Court?

Yes ____ No ____

Gambling

57. How do you feel generally about legalized gambling in Louisiana?

____ Approve
____ Disapprove
____ No opinion

58. Does your church or religious organization have a position on gambling?

____ Yes, it is against gambling.
____ Yes, it is not against gambling.

____ No, my church has no opinion on gambling.
____ Don't know.
____ Not applicable.
IF YES, do you agree with your church's position?
Yes ____ No ____

59. Do you have any moral or personal opposition to legalized gambling?

Yes ____ No ____

IF YES, please explain:_____
_____

60. Do or did you support the campaign to reform or repeal the state gaming laws?

Yes ____ No ____

61. Are you specifically opposed to any of the following:

Riverboat gambling	Yes ____ No ____
Casino gambling	Yes ____ No ____
Video poker	Yes ____ No ____

62. Have you or has anyone close to you ever had an interest in or investment with any companies or person involved in the ownership of gaming operations?

Yes ____ No ____

IF YES, please describe: _____
_____

63. Do you know anyone who has had any contact with the Louisiana State Police Riverboat Gaming Division?

Yes ____ No ____

IF YES, please explain: _____
_____
_____

64. Do you know anyone who now works or has worked in the gaming industry?

Yes ____ No ____

IF YES, please explain in what job(s), when, and where he/she is employed:

_____

_____

65. Have you read, seen, or heard any news reports regarding regulation of the gaming industry in Louisiana?

Yes ____ No ____

IF YES, what have you read, seen, or heard? _____

_____

66. Do you believe that the citizens of Louisiana should have more influence over how gambling is regulated in the state?

____ Agree strongly
____ Agree somewhat
____ Disagree somewhat
____ Disagree strongly
____ No opinion

67. Do you believe that a person who is connected with the gaming industry is more likely to violate the law than one who is not connected with the legalized gambling industry?

____ Agree strongly
____ Agree somewhat
____ Disagree somewhat
____ Disagree strongly
____ No opinion

68. Do you believe that the gaming industry is necessary to Louisiana's economy?

____ Agree strongly
____ Agree somewhat
____ Disagree somewhat
____ Disagree strongly

____ No opinion

69. Do you believe there has been corruption in the awarding of Louisiana riverboat gaming licenses?

____ Agree strongly
____ Agree somewhat
____ Disagree somewhat
____ Disagree strongly
____ No opinion

70. Do you believe former Governor Edwards is responsible for previous or current problems in the state's gaming industry?

____ Agree strongly
____ Agree somewhat
____ Disagree somewhat
____ Disagree strongly
____ No opinion

71. Do you believe that anyone who deals in large sums of cash is probably engaged in criminal activity?

____ Agree strongly
____ Agree somewhat
____ Disagree somewhat
____ Disagree strongly
____ No opinion

Jury Service/Experience and Opinions about the Court System

72. Have you ever served on a jury? Yes ____ No ____

IF YES, please complete the following for each case on which you served:

Civil or Criminal	Charges or Issues	Was a verdict reached?	Was a verdict Unanimous?	Were you the Foreperson?

Criminal Allegations When Where If no, why not? Verdict Foreperson?

_____

_____

73. Do you believe everyone should be treated equally under the law?

____ Agree strongly
____ Agree somewhat
____ Disagree somewhat
____ Disagree strongly

74. Do you believe the police are very thorough and accurate in their usual investigations?

____ Agree strongly
____ Agree somewhat
____ Disagree somewhat
____ Disagree strongly

75. Have you or your family been the victim of wrongdoing by others (whether or not criminal charges were filed)?

Yes ____ No ____

IF YES, please describe: _____

_____

_____

76. Have you ever testified as a witness in a trial?

Yes ____ No ____

Please explain: _____

_____

77. Have you or has a family member ever been involved in a lawsuit or legal action of any kind?

Yes ____ No ____

Please explain: _____

_____

78. Have you ever accused someone or been accused of dishonest practices or activities?

Yes ____ No ____

IF YES, please explain: _____

_____

_____

79. Do you know anyone (including an employer) who has been charged or

convicted of a crime or been involved in a criminal investigation?

Yes ____ No ____

IF YES, please explain: _____

_____

_____

80. Have you or anyone close to you ever been treated unfairly by any branch

of government?

Yes ____ No ____

IF YES, please identify the government agency and explain what happened.

_____

_____

81. Have you or has a close family member or friend ever served time in jail

or prison?

Yes ____ No ____

a. Please explain who, when, how long, and the nature of the

charge(s):

_____

_____

_____

b. Did you or that person apply for a pardon?

Yes ____ No ____

Please explain who applied, when, and the outcome:

_____

82. Do you know anyone who agreed to cooperate with the prosecution in a criminal case in order to get a reduced sentence or immunity?

Yes ____ No ____

IF YES, please explain: _____

_____

83. Some of the government's witnesses in this case are testifying as part of plea bargaining agreements or under a grant of immunity from prosecution. What is your opinion about the use of plea agreements or granting immunity for this purpose?

____ Approve

____ Disapprove

____ No opinion

Please explain your answer: _____

_____

84. What is your opinion regarding law enforcement's use of Court authorized telephone wire taps in conducting an investigation?

____ Approve

____ Disapprove

____ No opinion

Please explain your answer: _____

_____

85. What is your opinion regarding law enforcement's use of informants in gathering information relating to possible criminal violations of the

law?

____ Approve

____ Disapprove

____ No opinion
Please explain your answer: _____
_____

Connections with Parties to this Case

86. Do you or does anyone close to you know or have any connection with any of the prosecutors in the case: Eddie Jordan, Jr., Jim Letten, Michael Magner, Peter Strasser, Fred Harper, or Todd Greenberg?

Yes ____ No ____

IF YES, what is the connection and whom is it between? _____
_____
_____

87. Have you or has anyone close to you had any contact with Judge Polozola or his staff?

Yes ____ No ____

IF YES, please explain: _____
_____

88. Do you know anyone who is or was associated with any of the United States Attorney's offices in Louisiana, the U.S. Department of Justice, or the F.B.I.?

Yes ____ No ____

IF YES, what was the association and what is your relationship?

_____
_____
_____

89. Do you or does anyone close to you know of or have any connection with any of the following defense lawyers: Dan Small, Jim Cole, Pat Fanning, Sonny Garcia, Mary Olive Pierson, Hillar Moore, Rebecca Hudsmith, Craig Smith, William Jeffress, James Heavner, Ernest Johnson?

Yes ____ No ____

IF YES, what is the connection and whom is it between? _____

_____

_____

90. Do you or does anyone close to you know or have any connection with any of the defendants in this case: former Governor Edwin Edwards, Stephen Edwards, Cecil Brown, Senator Greg Tarver, Andrew Martin, Bobby Johnson or Ecotry Fuller?

Yes ____ No ____

IF YES, what is the connection and whom is it between? _____

_____

_____

91. Former Governor Edwin Edwards was previously tried and found not guilty of federal charges in 1986 in a separate case. Would your opinion of the verdict (in the prior case) make it difficult for you to sit as a fair and impartial juror in this case?

Yes ____ No ____ Not sure ____

IF YES OR NOT SURE, please explain: _____

_____

92. Would your current opinion about former Governor Edwards make it difficult for you to be a fair and impartial juror in this case?

Yes ____ No ____ Not sure ____

93. Do you think former state officials (no longer in office) should be allowed to provide services to companies doing business with, or regulated by, the state?

Yes ____ No ____

94. Do you think that a current state official's family members should be allowed to provide services to companies doing business with or regulated by the state?

Yes ____ No ____

Media

95. Do you read a daily newspaper?

Yes ____ No ____

Which one(s)? _____

96. What other magazines and newspapers do you read on a regular basis?

_____

97. What radio and television programs do you enjoy?

TV: _____

Radio: _____

98. Have you followed news accounts of any trials in the news?

Yes ____ No ____

IF YES, please explain: _____

_____

99. Do you or have you ever had a bumper sticker on your car?

Yes ____ No ____

IF YES, what does or did it say? _____

_____

Pretrial Publicity

Because this case has received publicity, you have probably seen, read, or heard something about this case either in the media or from friends, relatives, or co-workers. It is important that you carefully and completely answer the following questions concerning what you have learned about the case. There are no right or wrong answers. Please be as candid as possible.

100. a. Briefly tell what information you have read, seen, or heard about the case, the defendants, or their attorneys:

_____
_____
_____
_____
_____
_____

b. What have you read, seen, or heard about the government's investigation, the federal prosecutors, or government witnesses?

_____
_____
_____
_____
_____
_____

101. From which source(s) have you heard, read, or seen anything about this case? (Check any and all that apply)

____ TV news
____ Radio
____ Newspapers
____ Magazines
____ Internet
____ Word of mouth
Other: _____

102. Approximately how many media (television, newspaper, magazine, and radio) reports in total have you seen, read, or heard about this case?

____ None
____ 1 - 5
____ 6 - 10

____ 11 - 20
____ 21 - 30
____ 31 - 50
____ 51 - 75
____ 75 - 100
____ 101 - 200
____ More than 200

103. Have you heard others express opinions about this case or about any of the defendants?

Yes ____ No ____

IF YES, what opinions were expressed? _____

_____

_____

_____

104. Have you personally met or do you have any knowledge of anyone associated with this case?

Yes ____ No ____

IF YES, please list who they are and how you know them: _____

_____

_____.

105. Have you formed any opinion about the case or about any of the defendants?

Yes ____ No ____

IF YES, (a) what is your opinion? _____

_____

_____

(b) would you be able to set aside your current opinion and base your verdict on the law and evidence in this case? _____

_____

106. Every defendant is presumed innocent and cannot be convicted unless the jury, based solely on all the evidence in this case, unanimously decides that his guilt has been proven beyond a reasonable doubt. The burden of proving guilt rests entirely with the government. The defendants have no burden of proof at all. Would you have any difficulty following these rules?

Yes ____ No ____

107. If, as a juror, you determine that the government has proven a defendant guilty of a charged offense beyond a reasonable doubt, would you be able to vote in favor of a guilty verdict?

Yes ____ No ____

108. Conversely, if, as a juror, you believe that the government has failed to carry its burden of proving a defendant guilty of a charged offense beyond a reasonable doubt, would you be able to vote for a verdict of not guilty?

Yes ____ No ____

109. Do you believe that a defendant in a criminal trial should be required to

testify?

____ Agree

____ Disagree

IF AGREE: the judge will instruct you that:

a. a defendant in a criminal trial has no obligation to testify;

b. jurors cannot draw any conclusion from the fact that a defendant chooses not to testify; and

c. that the fact that a defendant chooses not to testify cannot be a factor in reaching your verdict.

Would you have any problem following those instructions if a defendant chooses not to testify?

Yes ____ No ____

IF YES, please explain: _____

_____

110. Would you be more likely to believe a law enforcement officer or other government agent than any other witness?

Yes ____ No ____ Treat all the same ____

111. You as a juror must follow the law as given to you by the Judge whether you agree with it or not. Would you have any difficulty following this rule?

Yes ____ No ____

112. The indictment in this case is an accusation and not evidence of guilt. Would you have any difficulty treating the indictment as an accusation and not as evidence of guilt?

Yes ____ No ____

113. There are seven defendants in this case. Each defendant and each charge must be considered separately. You cannot find a defendant guilty on any count unless the government has proven his guilt on that count beyond a reasonable doubt. You must not draw any conclusion from the fact that the defendants are on trial together, and you must not find one defendant guilty by reason of your finding another defendant guilty. Would you have difficulty following these rules?

Yes ____ No ____

114. Do you know of any reason why you could not fairly and impartially decide in accordance with your oath and based solely on the law and evidence, whether the government has proved a defendant's guilt beyond a reasonable doubt?

Yes ____ No ____

IF YES, what is the reason? _____

_____

_____

Conclusion

115. Is there any matter not covered by this questionnaire that you think the attorneys or court might want to know about when considering you as a juror in this case?

Yes ____ No ____

Please explain: _____

_____

_____

_____

116. Is there any matter not covered by this questionnaire that may affect your ability to reach a fair and impartial verdict?

Yes ____ No ____

IF YES, please explain: _____

_____

_____

_____

_____

*624 119 F.Supp.2d 589

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United States District Court,
M.D. Louisiana.
UNITED STATES of America
v.
Edwin EDWARDS, et al.
No. CR. 98-165-B-M2.
Aug. 22, 2000.

In prosecution based on alleged conspiracies involving extortion, bribery and public corruption, defendants filed various pre-trial, trial and post trial motions seeking to suppress results of wire, oral, video and electronic surveillance and to suppress evidence obtained as a result of searches conducted pursuant to a search of their homes, offices and/or safe deposit boxes. The District Court, Polozola, Chief Judge, held that: (1) defendants failed to make the requisite substantial preliminary showing for Franks hearing on truthfulness of the affidavits submitted by the government to support its request for a surveillance order; (2) sufficient probable cause was present to support order authorizing interception of wire communications on telephones located at both defendant's residence and his place of business; (3) application for wiretap order met necessity requirement; (4) sufficient information was presented to justify extensions of wiretap order; (5) order authorizing electronic surveillance of defendant at his law office was supported by probable cause; and (6) sufficient nexus existed between defendants' residences and offices and items sought in search warrants to support warrants authorizing search of defendants' residences and offices, and certain safe deposit boxes.

Motions denied.

West Headnotes

[1] Searches and Seizures k199
349k199

Defendants failed to make the requisite substantial preliminary showing for Franks hearing on truthfulness of the affidavits submitted by the government to support its request for a surveillance order; even if there were alleged errors or omissions in the affidavits, those alleged errors or omissions did not negate the probable cause which existed in the affidavits.

[2] Telecommunications k530
372k530

A judge's decision to issue a wiretap order based on his determination that probable cause exists is entitled to great deference.
18 U.S.C.A. s 2518.

[3] Telecommunications k515
372k515

Fact that a confidential witness may be involved in criminal conduct does not disqualify that witness' statements from being considered by court in determining whether probable cause exists for issuance of wiretap order. 18 U.S.C.A. s 2518.

[4] Telecommunications k515
372k515

Sufficient probable cause was present to support order authorizing interception of wire communications on telephones located at both defendant's residence and his place of business; confidential witness' statements implicating defendant in criminal activity were independently corroborated by other credible evidence including consensual recordings made at the

direction of FBI and a piece of paper which detailed illegal monetary payments which had been requested by defendant. 18 U.S.C.A. s 2518.

[5] Searches and Seizures k199
349k199

A defendant is not entitled to an Franks hearing on a motion to suppress unless there are allegations that amount to a substantial preliminary showing of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof.

[6] Telecommunications k516
372k516

Government need not prove exhaustion of every conceivable option before a wiretap order may issue. 18 U.S.C.A. s 2518(1)(c), (3)(c).

[7] Telecommunications k516
372k516

Application for order authorizing interception of wire communications on telephones located at both defendant's residence and his place of business met necessity requirement; affidavit stated that normal investigative techniques were either tried, used or unlikely to succeed in gathering enough evidence to prosecute the suspected activity, and affidavit also gave a detailed account of
the investigative techniques used by the agents. 18 U.S.C.A. s 2518(1)(c), (3)(c).

[8] Telecommunications k519.1
372k519.1

Affidavits, supplemented by logs, tapes and progress reports, provided more than adequate information for the issuing judge to rely on in determining whether to extend wiretap order, and sufficient information was presented to judge for him to conclude there was evidence of criminal activity to justify multiple extensions of his initial order.

[9] Telecommunications k515
372k515

[9] Telecommunications k519.1
372k519.1

Judge did not act in an arbitrary manner when he initially issued and subsequently extended his surveillance order authorizing electronic surveillance of defendant's home; affidavit submitted by FBI agent referred to telephone conversations between defendant and codefendant which establish probable cause to believe defendant was a participant in and had knowledge of codefendant's illegal scheme, and there were sufficient calls made during initial thirty-day period and during subsequent periods which established criminal activity with respect to various illegal schemes. 18 U.S.C.A. § 2518.

[10] Telecommunications k515
372k515

There was sufficient probable cause to believe that defendant's law office had been, was, and would continue to be used for criminal activity, and therefore order authorizing electronic surveillance of defendant at his law office was proper. 18 U.S.C.A. § 2518.

[11] Telecommunications k514.1
372k514.1

Each Title III electronic surveillance application must include a "particular description" of the location where the government proposes to intercept communications; however, application is not required to disclose the exact location of where devices will be placed. 18 U.S.C.A. § 2518(1).

[12] Telecommunications k520
372k520

Order authorizing interception of communications at office building authorized interception of communications in the personal office of defendant as well as codefendant; application procedure, including the attachments provided to judge supported conclusion that judge understood the design of the office building and intended to authorize surveillance in the entire office building, and describing the building as the "law office of [codefendant]" was sufficiently particular to satisfy Title III requirements. 18 U.S.C.A. § 2518(1).

[13] Searches and Seizures k113.1
349k113.1

Mere fact that there is probable cause to believe that a person committed a crime does not in and of itself constitute probable cause to search his residence or office for evidence of that crime; a nexus must exist between the residence or office and the items sought in the search warrant.

[14] Searches and Seizures k114
349k114

Sufficient nexus existed between the defendants' residences and offices and business records, bank account statements, phone records and currency sought in search warrants to support

warrants authorizing search of defendants' residences and offices, and certain safe deposit boxes; based upon the ongoing extortion and bribery allegedly occurring on the part of defendants and other co-conspirators, it was logical to infer that the types of items sought in warrants would be found at places to be searched.

[15] Searches and Seizures k121.1
349k121.1

Fairly long periods of time are allowed to elapse between information and a search warrant in cases where the evidence clearly shows a longstanding, on- going pattern of criminal activity.

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Edwin Edwards, Baton, Rouge, LA, Pro se.

Stephen Edwards, Baton, Rouge, LA, Pro se.

RULING ON MOTIONS TO SUPPRESS

POLOZOLA, Chief Judge.

This matter is before the Court on various pre-trial, trial and post trial motions filed by the defendants which seek to suppress the results of wire, oral, video and electronic surveillance. Edwin Edwards, Stephen Edwards and Cecil Brown also have filed motions to suppress evidence obtained as a result of searches conducted pursuant to a search of their homes, offices and/or safe deposit boxes. The defendants also sought in pre-trial motions an evidentiary hearing under Franks v. Delaware. [FN1] The defendants renewed their Franks motion and motions to suppress in motions filed during the course of the trial. [FN2] For reasons which follow, these motions are denied.

FN1. 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

FN2. The defendants renewed their Franks motion and motion to suppress in their motion for a new trial. A separate ruling will be made on the defendants' motion for a new trial at a later date.

*390 Introduction

Prior to the trial, the defendants filed the following motions to suppress: (1) motion of all defendants to suppress the fruits of wire, oral and electronic surveillance; [FN3] (2) Stephen Edwards' motion to suppress evidence derived from a tape recorded conversation between Richard Shetler and Stephen Edwards; [FN4] (3) Cecil Brown's motion to suppress fruits of search warrants relative to Brown's office and residence; [FN5] (4) Stephen Edwards' motion to suppress fruits of search warrants relative to his office, residence, and safe deposit box number 5069; [FN6] and (5) Edwin Edwards' motion to suppress fruits of search warrants relative to his office, residence,

and safe deposit box number 2378. [FN7] On November 17, 1999, the Court held oral argument on these motions. Thereafter, the Court denied each of the pre-trial suppression motions. The Court also denied defendants' request for a Franks hearing. During the course of the trial, the defendants filed a renewed motion for a Franks hearing and to suppress evidence. The Court denied each of these motions and now assigns reasons in support of its decisions.

FN3. Rec. Doc. No. 440.

FN4. Rec. Doc. No. 445.

FN5. Rec. Doc. No. 450.

FN6. Rec. Doc. No. 447.

FN7. Rec. Doc. No. 469, replacing Rec. Doc. No. 452.

All defendants seek to suppress all evidence obtained as a result of wire, oral, video and electronic surveillance. The defendants seek relief under Title III, 18 U.S.C. ss 2510-2522 and the Fourth Amendment. Defendants contend:

(1) The wire surveillance of Cecil Brown is based on the uncorroborated story of Pat Graham;
(2) The FBI agents did not inform Judge Donald E. Walter of Pat Graham's dishonesty;
(3) The June 26, 1996 affidavit of Agent Freddie Cleveland lacked probable cause;
(4) Agent Cleveland's affidavit failed to demonstrate necessity as required by Title III;
(5) Since there was improper surveillance of Cecil Brown's telephone, all evidence obtained during the entire course of surveillance must be suppressed;
(6) The surveillance of Edwin Edwards' home was improper because there was no basis to conclude that a wiretap at Edwin

Edwards' home would produce evidence of crimes;
(7) There was no probable cause for repeated extensions of the wiretap order at Edwin Edwards' home;
(8) There was no probable cause to believe that Edwin Edwards' law office had or would be used to commit the crimes alleged;
(9) The affidavit of Agent Geoffrey Santini failed to establish probable cause to conduct surveillance of Edwin Edwards' law office;
(10) The surveillance of Stephen Edwards' office was conducted without court authorization;
(11) There was no probable cause to believe that the law office of Stephen Edwards had been or would be used to commit the crimes alleged.

In response to these motions, the government contends that each of the surveillance orders issued by Judges Donald E. Walter and John V. Parker were based on probable cause. The government further contends the surveillance orders were properly issued pursuant to Title III, 18 U.S.C. ss 2510-2522 and there were no violations of the Fourth Amendment. Finally, the government contends the FBI agents did not intentionally or recklessly mislead or present false information or *391 omit material information to the federal judges who issued the Title III orders.

The defendants Edwin Edwards, Stephen Edwards and Cecil Brown have also filed motions to suppress evidence obtained as a result of search warrants. Edwin Edwards seeks to suppress evidence taken from his home, located at 19228 Troon Court, safe deposit box number 2378 at City National Bank and his law office.

Stephen Edwards seeks to suppress a tape recorded conversation between Richard Shetler and Stephen Edwards, [FN8] and any evidence obtained from a search of his residence, safe deposit box number 5069 located at Regions Bank, and the office located at 4621 Jamestown Avenue.

FN8. The Court has already issued a separate written opinion on this issue. See Rec. Doc. Nos. 770 and 771.

Cecil Brown has also filed a motion to suppress evidence obtained from the search of his residence, Route Box 62, Eunice, Louisiana; Cecil Brown's Building, Brown's Auction Company, Louisiana Consultants, Inc., 1211 East Laurel Street, Eunice, Louisiana; and Kenneth Pitre's law office, 100 Vivian Street, Eunice, Louisiana.

In response to the defendants' motions to suppress the evidence obtained pursuant to these search warrants, the government contends the warrants were based on probable cause and each search was valid and constitutional.

Thus, the Court must determine whether the Title III authorizations issued by Judges Walter and Parker were valid. The Court must also determine the validity of the search warrants issued in this case.

After hearing the arguments and evidence presented in connection with the pre- trial motions to suppress, the Court denied each of the motions. The Court also found that the defendants were not entitled to an evidentiary hearing under Franks.

During the trial, the defendants filed another request for a Franks hearing and renewed their motion to suppress. The Court again finds that there was and is no need for a Franks hearing. The Court also finds defendants' renewed motion to suppress is without merit and should be denied.

The Court will discuss each of the motions and the various contentions of the parties. Each of the parties' contentions was considered by the Court in deciding the motions whether or not specifically discussed herein.

Probable Cause Standard

In Illinois v. Gates, [FN9] the Supreme Court adopted a "totality of the circumstances" analysis for determining whether probable cause exists for the issuance of a search warrant. The Court noted that the probable cause standard is a "practical, nontechnical conception." [FN10] Indeed, the Gates Court stated:

FN9. 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).

FN10. Id. at 233, 103 S.Ct. at 2330 (quoting Brinegar v. United States, 338 U.S. 160, 173, 69 S.Ct. 1302, 1311, 93 L.Ed. 1879 (1949)).

> "In dealing with probable cause, ... as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."

* * * * * *

As these comments illustrate, probable cause is a fluid concept-turning on the assessment of probabilities in particular factual contexts-not readily, or even usefully, reduced to a neat set of legal rules.

* * * * * *

As early as Locke v. United States, 11 U.S. 339, 7 Cranch, 339, 348, 3 L.Ed. 364 (1813), Chief Justice Marshall observed, in a closely related context: "[T]he term *392 'probable cause,' according to its usual acceptation, means less than evidence which would justify condemnation.... It imports a seizure made under circumstances which warrant suspicion." ... Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no

place in the magistrate's decision. [FN11]

FN11. Gates, 462 U.S. at 231, 232, 235, 103 S.Ct. at 2328, 2329, 2330 (internal citations omitted).

The standard under which a court is to review a magistrate judge's or district judge's initial determination of probable cause was set forth in Gates as follows:

> Similarly, we have repeatedly said that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review. A magistrate's "determination of probable cause should be paid great deference by reviewing courts." "A grudging or negative attitude by reviewing courts toward warrants[ ]" is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant; "courts should not invalidate warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than a commonsense, manner." [FN12]

FN12. Id. at 236, 103 S.Ct. at 2331 (internal citations omitted).

Although Illinois v. Gates involved the adequacy of a search warrant, the same "totality of the circumstances" test has been applied to determine whether probable cause existed for the authorization of an order permitting the interception of telephone calls and other conversations pursuant to 18 U.S.C. s 2518(3). [FN13] An application for a court-authorized wiretap "must demonstrate probable cause to believe that the target has committed, is committing, or will commit a crime, as well as 'probable cause for belief that particular communications concerning that offense will be obtained through such interception.' " [FN14] Probable cause is evaluated utilizing a

totality of the circumstances test. [FN15]

FN13. United States v. Bankston, 182 F.3d 296, 306 (5th Cir.1999), cert. granted in part by Cleveland v. U.S., 529 U.S. 1017, 120 S.Ct. 1416, 146 L.Ed.2d 309 (Mar. 20, 2000) (No. 99-804) (citing United States v. Dickey, 102 F.3d 157, 162 (5th Cir.1996)). See also United States v. Cherry, 50 F.3d 338, 341 (5th Cir.1995); Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527.

FN14. Bankston, 182 F.3d at 305-306 (citing 18 U.S.C. s 2518(3)(a)-(b)).

FN15. Bankston, 182 F.3d at 306 (citing Dickey, 102 F.3d at 162).

In United States v. Gonzales, [FN16] the Fifth Circuit explained the meaning of probable cause in the context of a wiretap as follows:

FN16. 866 F.2d 781 (5th Cir.1989), cert. denied, 490 U.S. 1093, 109 S.Ct. 2438, 104 L.Ed.2d 994 (1989).

An order authorizing a wiretap, like an ordinary search warrant, must be supported by a finding of probable cause. If the judge uses common sense and bases [a] finding on the entire picture presented [ ], our review is limited. "When this is done [the] determination is conclusive in the absence of arbitrariness." The task of the issuing judge is to make a common sense decision whether the affidavit shows a fair probability that evidence will be obtained, according to all the circumstances, including the veracity and basis of knowledge of anyone supplying hearsay information. [FN17]

FN17. Id. at 786 (quoting United States v. Weinrich, 586 F.2d 481, 487 (5th Cir.1978), cert. denied, 440 U.S. 982, 99 S.Ct. 1792, 60 L.Ed.2d 243 (1979), and cert. denied, 441 U.S. 927, 99

S.Ct. 2041, 60 L.Ed.2d 402 (1979)).

In other words, "[p]robable cause is to be gleaned from a 'common sense reading of the entire affidavit' ...." [FN18]

FN18. United States v. Hyde, 574 F.2d 856, 863 (5th Cir.1978) (quoting Spinelli v. United States, 393 U.S. 410, 415, 89 S.Ct. 584, 588, 21 L.Ed.2d 637 (1969)).

*393 A careful review of the affidavits submitted to Judges Walter and Parker to obtain orders authorizing the use of oral, video and electronic surveillance reveals that they were supported by probable cause. The search warrants issued by these judges for the searches of homes, offices and/or safe deposit boxes of the various defendants were also supported by probable cause. These
conclusions will be discussed in more detail later in this opinion.

The Court now turns to a discussion of whether the Court should have granted the defendants a Franks hearing.

The Standard for a Franks Hearing

The defendants' motion to suppress challenges the truthfulness of the affidavits submitted by the government to support its request for a surveillance order. The defendants contend the affidavits contained intentional and/or reckless false statements or material omissions. The Court believes an analysis of the standards set forth by the Supreme Court in Franks and jurisprudence from the Fifth Circuit and other circuits on this issue is essential to properly decide this issue.

In United States v. Bankston, the Fifth Circuit succinctly summarized the standards the defendants must meet to obtain a Franks hearing as follows:

> In Franks v. Delaware, the Supreme Court held that a defendant is entitled to an evidentiary hearing to contest the validity of a search warrant if he makes a substantial preliminary showing that (1) allegations in a supporting affidavit were a deliberate falsehood or made with a reckless disregard for the truth and (2) the remaining portion of the affidavit is not sufficient to support a finding of probable cause. We have explained that "even if the defendant makes a showing of deliberate falsity or reckless disregard for the truth by law enforcement officers, he is not entitled to a hearing if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause." [FN19]

FN19. 182 F.3d 296, 305 (5th Cir.1999) (quoting United States v. Privette, 947 F.2d 1259, 1261 (5th Cir.1991)) (internal citation omitted).

In United States v. Cleveland, [FN20] Judge Sarah Vance set forth a more detailed discussion and analysis of the Franks standards and the jurisprudence which has ensued following the Franks decision. The Court adopts the following from Judge Vance's very thorough opinion: [FN21]

FN20. 964 F.Supp. 1073 (E.D.La.1997).

FN21. The Fifth Circuit affirmed Judge Vance's opinion. See United States v. Bankston, 182 F.3d 296 (5th Cir.1999), cert. granted in part by Cleveland v. United States, 529 U.S. 1017, 120 S.Ct. 1416, 146 L.Ed.2d 309 (2000).

In Franks, the Supreme Court determined that criminal defendants have a limited right, under the Fourth and Fourteenth

Amendments, to challenge the truthfulness of factual statements made in an affidavit supporting a search warrant, subsequent to the ex parte issuance of the warrant. Franks, 438 U.S. at 155-56, 98 S.Ct. at 2676. Franks ' rule is of "limited scope, both in regard to when exclusion of the seized evidence is mandated, and when a hearing on allegations of misstatements must be accorded." Id. at 167, 98 S.Ct. at 2682.

Under Franks, "[t]here is ... a presumption of validity with respect to the affidavit supporting the search warrant." Id. at 171, 98 S.Ct. at 2684. In order to receive an evidentiary hearing on suppression, a defendant attacking the validity of an affidavit supporting a search warrant must make a "substantial preliminary showing" that: (1) the affiant knowingly and intentionally, or with reckless disregard for the truth, made a false statement in the warrant affidavit and (2) the remaining portion of the affidavit is insufficient to support a finding *394 of probable cause. Id. at 171, 98 S.Ct. at 2684; see also, United States v. Dickey, 102 F.3d 157, 161-62 (5th Cir.1996). The Court spelled out in some detail what it meant by a "substantial preliminary showing:"

To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one

side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. Id. at 171-72, 98 S.Ct. at 2684.

The "substantial preliminary showing" requirement is not lightly met. See United States v. Hiveley, 61 F.3d 1358, 1360 (8th Cir.1995); United States v. Tibolt, 72 F.3d 965, 973 (1st Cir.1995), cert. denied, 518 U.S. 1020, 116 S.Ct. 2554, 135 L.Ed.2d 1073 (1996); United States v. Wajda, 810 F.2d 754, 758 (8th Cir.1987), cert. denied, 481 U.S. 1040, 107 S.Ct. 1981, 95 L.Ed.2d 821 (1987). Furthermore, even if the defendant makes the requisite substantial preliminary showing for an evidentiary hearing, suppression is still not mandated unless the defendant establishes at the hearing, by a preponderance of evidence, that the misstatements in question were made intentionally or with reckless disregard for the truth and that, with the false statement omitted, probable cause was lacking. Franks, 438 U.S. at 156, 98 S.Ct. at 2676.

The Franks holding has been extended to cover alleged omissions in a supporting affidavit, as well as false statements. See United States v. Tomblin, 46 F.3d 1369, 1377 (5th Cir.1995); United States v. Atkin, 107 F.3d 1213, 1216-17 (6th Cir.1997); United States v. Hunter, 86 F.3d 679, 682 (7th Cir.1996), cert. denied, 519 U.S. 985, 117 S.Ct. 443, 136 L.Ed.2d 339 (1996); Hiveley, 61 F.3d at 1360; United States v. Collins, 61 F.3d 1379, 1384 (9th Cir.1995), cert. denied, 516 U.S. 1000, 116 S.Ct. 543, 133 L.Ed.2d 446 (1995); United States v. Paradis, 802 F.2d 553, 558 (1st Cir.1986). Courts have noted, however, that while omissions are not exempt from inquiry under Franks, affidavits containing omissions of potentially exculpatory information are less likely to present a question of impermissible official conduct than those that affirmatively include false information. Atkin, 107 F.3d at 1216-17; United States v. Martin, 920 F.2d 393, 398 (6th Cir.1990); United States v. Colkley, 899 F.2d 297, 301 (4th Cir.1990). In cases involving omissions, to trigger an evidentiary

hearing, a defendant must make a substantial preliminary showing that: 1) the omission was made intentionally and/or with reckless disregard for the omission's tendency to mislead and 2) if the omitted material had been included in the supporting affidavit, there would not have been probable cause. See, e.g., Atkin, 107 F.3d at 1217 ("If the defendant does succeed in making a preliminary showing that the government affiant engaged in 'deliberate falsehood' or 'reckless disregard for the truth' in omitting information from the affidavit, the court must consider the *395 affidavit, including the omitted portions, and determine whether probable cause still exists."); see also, Tomblin, 46 F.3d at 1377; Hiveley, 61 F.3d at 1360; Collins, 61 F.3d at 1384; Paradis, 802 F.2d at 558.

The Fifth Circuit has acknowledged that "it will often be difficult for an accused to prove that an omission was made intentionally or with reckless disregard rather than negligently unless he has somehow gained independent evidence that the affiant had acted from bad motive or recklessly in conducting his investigation and making the affidavit." United States v. Martin, 615 F.2d 318, 329 (5th Cir.1980). For this reason, the Fifth Circuit has recognized that "when the facts omitted from the affidavit are clearly critical to a finding of probable cause the fact of recklessness may be inferred from proof of the omission itself." Id. (emphasis added). See also, United States v. Cronan, 937 F.2d 163, 165 (5th Cir.1991); Hale v. Fish, 899 F.2d 390, 400 (5th Cir.1990) (same); United States v. Namer, 680 F.2d 1088, 1094 (5th Cir.1982), cert. denied, 486 U.S. 1006, 108 S.Ct. 1731, 100 L.Ed.2d 195 (1988). Thus, under Fifth Circuit law, if the materiality of the omission is great enough, recklessness can be inferred. In such cases, the analytical concepts of materiality and recklessness are "bound together," collapsing the dual inquiry of Franks into both "intentionality" and "materiality" into a single inquiry into materiality. Namer, 680 F.2d at 1094. But see, Colkley, 899 F.2d at 301 (rejecting Fifth Circuit position that bad motive under Franks can be inferred from fact of omission alone because Franks intended for a inquiry into both

intentionality and materiality in all cases). However, reckless intent is to be inferred only in extreme cases when the materiality of the omitted material is "clearly critical" to the probable cause determination. [FN22]

FN22. Cleveland, 964 F.Supp. at 1076-1078.

[1] Applying the Franks analysis to this case, the Court finds that the defendants have failed to make the requisite substantial preliminary showing for an evidentiary hearing. The Court further finds that the defendants' assertion of falsity and/or intentional omission are unpersuasive and without merit in light of all of the information available to the affiant at the time he signed the affidavit. The fact that Agent Santini admitted during the trial that there were several errors in his affidavit regarding facts pertaining to payoffs to members of the Gaming Board does not change the Court's decision or require an evidentiary hearing. There was an adequate factual and good faith basis for the statements made in the affidavit at the time the affidavit was prepared and submitted to the issuing judges. The same may be said of the arguments defendants make regarding the circumstances surrounding Patrick Graham's credibility. The Court finds that the affidavits contained sufficient information about Patrick Graham's past and current criminal activity for the issuing judges to consider in determining whether to issue the warrants. The fact that a judge in Texas may now be conducting an inquiry into the circumstances surrounding the plea agreement that the government made with Patrick Graham does not affect the validity of the affidavits submitted to Judges Parker and Walter. Even if there were alleged errors or omissions in the affidavits, these alleged errors or omissions do not negate the probable cause which existed in the affidavits. In short, the Court finds that the federal agent did not "intentionally mislead," or trick, the district court into issuing the surveillance authorizations. The Court also finds there were no material misrepresentations made by the FBI agents which would have negated a probable cause finding by the two judges who issued

the electronic authorizations. The Court's decision would not change even if the challenged statements were corrected *396 or if more information about the Grahams were included. There was sufficient information set forth in the affidavit regarding the Grahams as well as substantial corroboration of this information from other sources. The same may be said of the other challenged statements. There would have been sufficient probable cause to issue the authorizations even if the information had been corrected.

The Court now turns to an analysis of the arguments made by the parties regarding the electronic, oral and video authorizations. The Court will then discuss the validity of the searches of the homes, offices and post office boxes of the defendants.

Motions to Suppress Fruits of Wire, Oral and Electronic Surveillance

The defendants seek to suppress the fruits of wire, oral and electronic surveillance conducted at the home and business of Cecil Brown, the home of Edwin Edwards, and the law office of Edwin and Stephen Edwards. This motion requires the Court to review the orders issued by Judge Walter of the Western District of Louisiana and Judge Parker of the Middle District of Louisiana. Each of these judges authorized separate wiretap orders which are in question in this case.

A review of the record reveals that after a very thorough investigation conducted by the FBI, the United States filed an application on June 26, 1996 for authorization to conduct a wiretap on the home and office telephones of Cecil Brown. Judge Walter granted the order on the same date. The order was extended for thirty days on July 25, 1996 and thereafter for additional thirty-day periods until February of 1997. The focus of the Brown investigation was his involvement with the Jena, Louisiana prison project. During the course of the Brown

investigation, the government obtained information about Edwin Edwards. The United States then filed an application with Judge Parker on October 18, 1996 to obtain authorization to place a wiretap on Edwin Edwards' home telephone. On December 6, 1996, electronic surveillance was authorized on the law office of Edwin Edwards. Stephen Edwards was added as an interceptee at the law office the following month.

In their combined motion to suppress, the defendants challenge (1) the initial wiretap of Cecil Brown's phones; (2) the electronic surveillance of Edwin Edwards' home; (3) the electronic surveillance of Edwin Edwards' law office; and (4) the electronic surveillance of Stephen Edwards' law office. The Court will address each of these challenges separately.

The Electronic Surveillance of Cecil Brown

The Defendants' Contentions

The defendants challenge the June 26, 1996 order authorizing the interception of wire communications on telephones located at both Cecil Brown's residence and his place of business. The defendants assert that: (1) there was insufficient probable cause to support the order; (2) the government's application for the order failed to meet the "necessity" requirement of 18 U.S.C. s 2518(3)(c); and (3) since there was no probable cause and no "necessity," all of the evidence that was obtained as a result of the first interception order must be suppressed under a "fruit of the poisonous tree" theory.

In support of their objections to the Title III order issued by Judge Walter, the defendants argue that the affidavit contained: (1) material omissions regarding the confidential witness' (CW) credibility; (2) a lack of "any credible evidence" of payments made to Edwin Edwards with respect to the Jena Project; and (3) material omissions regarding conversations to the contrary. The defendants further argue that based on these contentions, the

June 2, 1996 wiretap order was improper because it lacked probable cause. The defendants also maintain that these deficiencies represent a "substantial preliminary showing" of falsity entitling them to *397 an evidentiary hearing on the matter, commonly called a Franks hearing.

The Government's Response

The United States contends that the affidavit clearly established the probable cause required for a judge to enter a wiretap order under Title III. The United States also argues that there were no knowing or intentional false statements or omissions in the affidavits. In short, the government contends that all relevant matters were brought to Judge Walter's attention in the affidavit and probable cause was properly found. With respect to any omitted statements, the government contends there was no attempt by the agents to mislead the court or to keep relevant information from the court. Even if the omitted statements were added to the affidavit for purposes of analysis under Franks, the government contends there would be no effect on the quantum of probable cause. Finally, he government argues that a Franks hearing is not required under the facts of this case.

Material omissions regarding the confidential witness' (CW) credibility

The defendants argue that the government failed to fully inform the judge of the CW's unreliability and dishonesty. [FN23] Defendants rely in part on comments made by an Assistant United States Attorney in a bankruptcy case regarding the credibility of the CW after the June 26, 1996 order was issued. Specifically, defendants refer to a comment that the government did not believe anything the CW said unless it could be independently corroborated. Defendants contrast this with a statement in the affidavit the government submitted in support of the application which stated that during the CW's period of cooperation "he has never been known to provide false or

misleading information." [FN24] Moreover, defendants argue that although the statement came after the initial application was presented to Judge Walter, the statements made to the bankruptcy judge are indicative of a posture adopted by the government sometime before the application was made.

FN23. See Rec. Doc. No. 440 at 57-61.

FN24. See Rec. Doc. No. 440 (Exh. 5b at 9).

The government contends that the defendants only chose selected portions of the statement made by the Assistant United States Attorney. The relevant portions of the statement made by Assistant United States Attorney Steve Irwin to the bankruptcy court provide:

> I am defending the Grahams as good people; they are not. They're as bad as they come. Unfortunately, you know they came to us and we've been able to independently corroborate the things they tell us. And the things that we're not able to independently corroborate, we believe are lies. And that's the way it has to be when you deal with the Grahams. And thus far, we've been able to independently corroborate--including disperse monies and how the money was generated, where the money came from and where the money went, and it's not as has been portrayed to this Court at this time by the litigants here. [FN25]

FN25. Defense Exhibit 2. See also SA McHenry transcript, pp. 35, 36.

[2][3][4] It is clear that "an informant's 'veracity,' 'reliability' and 'basis of knowledge' are all highly relevant." [FN26] However, this Court finds that Judge Walter was given ample information

by the United States in the affidavit about Pat Graham to raise the issue of his credibility at the time Judge Walter made his decision to issue the wiretap order. The affidavit submitted to Judge Walter clearly provides that the CW was indicted by a grand jury only three months earlier and was also "the target of [an ongoing] federal tax *398 and corruption investigation." [FN27] A judge's decision to issue a warrant based on his determination that probable cause exists is entitled to great deference. [FN28] The fact that a CW may be involved in criminal conduct does not disqualify that CW's statements from being considered by the Court in making its probable cause determination. This is particularly so under the totality of the facts of this case where the CW's statements were independently corroborated by other credible evidence. In this case there was substantial independent corroboration of the CW's statements. Pat Graham's statements about the Jena Prison Project were set forth in paragraphs 16 through 27 of Agent Cleveland's affidavit. [FN29] The FBI corroborated Pat Graham's statements through consensual recordings made by Pat Graham at the direction of the FBI. These consensual recordings include telephone conversations between Patrick Graham and Cecil Brown which occurred on May 7, 1996, May 8, 1996, May 9, 1996, June 7, 1996 and June 10, 1996. There was also a consensual recording made by Pat Graham at a May 29, 1996 crawfish boil held at Cecil Brown's residence.

FN26. See Illinois v. Gates, 462 U.S. 213, 230, 103 S.Ct. 2317, 2328, 76 L.Ed.2d 527 (1983).

FN27. See Rec. Doc. No. 440 (Exh. 5b at 9) ("A review of the various records pertaining to the CW reveals that on March 20, 1996, a District Court Grand Jury in Harris County, Texas indicted the CW for one (1) count of Money Laundering and one (1) count of Theft by Sting. This matter is pending and is scheduled for trial on July 29, 1996. The CW is also the target of a federal tax and corruption investigation in the Houston, Texas area, currently being handled by the FBI and the IRS in

conjunction with the United States Attorney's Office.").

FN28. United States v. Phillips, 727 F.2d 392, 395 (5th Cir.1984) (citing United States v. Smith, 686 F.2d 234, 238 n. 3 (5th Cir.1982); United States v. Freeman, 685 F.2d 942, 948 (5th Cir.1982); Doescher v. Estelle, 666 F.2d 285, 289 (5th Cir.1982)).

FN29. See also Government's Exh. 1 and 2.

A careful review of the transcripts of these conversations and the agent's description of these conversations in the affidavit reveals that the agent did not misrepresent the meaning or context of the affidavits to Judge Walter. Furthermore, to the extent there were omissions in the affidavit of statements made in the consensual recordings, this did not affect the court's finding of probable cause.

In addition to the consensual recordings, the FBI also had a copy of a piece of paper which Pat Graham brought to the May 29, 1996 crawfish boil which detailed the monetary payments which had been requested by Brown. [FN30] This evidence, when taken in proper context and considered with the totality of the circumstances set forth in the affidavit, demonstrated probable cause to believe that the target of this application for a wiretap has committed, was committing or will commit a crime. The affidavit also demonstrated probable cause for belief that particular communications concerning the offense would be obtained through such interception as required by 18 U.S.C. § 2518(3)(a)-(b). This Court cannot say Judge Walter erred in deciding that sufficient probable cause was present to issue this order.

FN30. See Government's Exh. 5 and 7.

There was a sufficient showing regarding the suspected crime to support the order

To support their argument that there were intentional misstatements and material omissions regarding the crime alleged in the application, the defendants contend that: (1) the statements of the CW were uncorroborated hearsay and could not support the order; (2) the transcript of the consensually recorded conversations between the CW and Cecil Brown reveal only innocent transactions and Edwin Edwards' "friendly interest" in Brown's compensation regarding the Jena Project; and (3) there were material omissions contained in the application that were intended to mislead the court into finding probable cause to issue the order.

*399 The defendants assert that there is no "substantial basis of credibility" supporting the hearsay statements made in the application, as required by Illinois v. Gates. [FN31] This argument is without merit under the facts of this case. The Court also notes that the defendants fail to specify which statements they are contesting. Instead, the defendants reject generally any statements made regarding the payment of money to Edwin Edwards. The defendants also fail to recognize that paragraphs 29 through 40 of the affidavit in support of the application contained summaries of consensually recorded conversations. These paragraphs alone "substantially corroborate" for the purposes of this motion any hearsay problem that might have otherwise existed. Additionally, the defendants fail to consider the pen register information that confirms various conversations between Cecil Brown and Edwin Edwards.

FN31. 462 U.S. 213, 245, 103 S.Ct. 2317, 2335, 76 L.Ed.2d 527 (1983).

The defendants also allege that Edwin Edwards' involvement in the Jena Prison Project did not rise to the level of criminal behavior. They assert that Cecil Brown was merely "lobbying." Whether Edwin Edwards actually received payments is a question fact to be resolved by a jury and is not a proper issue to be addressed by the Court within the confines of a motion to

suppress. Furthermore, the standard of review is one of arbitrariness. The sound discretion of the issuing judge will not be disturbed by this Court absent a more significant showing than the one presented here. There is sufficient evidence of possible criminal involvement to at least warrant the further investigation requested in the Title III application.

Finally, the defendants argue that Cecil Brown's remarks to the effect that Edwin Edwards was not getting any of the money and that it was all his were intentionally omitted from the application to mislead the court. Accordingly, the defendants assert that they are entitled to an evidentiary hearing under Franks v. Delaware. [FN32]

FN32. 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

[5] The Court summarized the requirements for a Franks hearing earlier in this opinion. The law in the Fifth Circuit regarding what is required to obtain a Franks hearing is also clear. The defendants are not entitled to an evidentiary hearing on a motion to suppress unless there are allegations that amount to a substantial preliminary showing of "deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof." [FN33] The Fifth Circuit has applied Franks to instances of omission where, as here, an affidavit falls squarely within the dictates of 18 U.S.C. s 2518. [FN34]

FN33. Id. at 171, 98 S.Ct. at 2684.

FN34. See United States v. Bankston, 182 F.3d 296 (5th Cir.1999), cert. granted in part by Cleveland v. United States, 529 U.S. 1017, 120 S.Ct. 1416, 146 L.Ed.2d 309 (2000) (No. 99-804).

As Judge Vance noted in United States v. Cleveland: "The 'substantial preliminary showing' requirement set forth in Franks

is not lightly met." [FN35] The proper analysis is whether the affidavit, corrected to contain the allegedly exculpatory conversation, satisfies the wiretap requirements set forth in 18 U.S.C. § 2518. [FN36]

FN35. 964 F.Supp. 1073, 1077 (E.D.La.1997) (citations omitted).

FN36. See Bankston, 182 F.3d at 305.

The defendants have characterized the affiant's interpretation of the conversations between the CW and Cecil Brown as "creative." However, the Court finds that they were at least plausible and certainly do not rise to the level of intentional misstatements designed to mislead the court. The defendants' interpretation is not the focus of this Court's inquiry. Rather, the *400 Court must determine whether, given the evidence presented, the defendants have met their substantial preliminary burden of showing the falsity of the omissions. The Court concludes they have not. Even if the Court were to find that these statements were intentionally omitted, the defendants would still not be entitled to a Franks hearing.

If the omitted information were included, the transcripts of various conversations would still provide substantial grounds to believe that evidence of criminal activity would be obtained through the use of electronic surveillance. The fact that Cecil Brown denies Edwin Edwards' "take" of the proceeds of this transaction in one particular excerpt does not negate the additional information in the record regarding potential criminal payoffs. Thus, there was probable cause to issue the order even when the omitted material is included in the affidavit.

There Was "Necessity" Under 18 U.S.C. s 2518(1)(c) and 2518(3)(c)

[6] The defendants also argue that the necessity requirement of 18 U.S.C. § 2518(1)(c) and 2518(3)(c) was not met in the government's application for the initial July 26, 1996 wiretap order. Section 2518(1)(c) requires "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." Section 2518(3)(c) requires the government to show and the issuing judge to find that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." [FN37] The government need not prove exhaustion of every conceivable option before a wiretap order may issue. [FN38] In United States v. Collins, the Fifth Circuit held the following:

FN37. Bankston, 182 F.3d at 305.

FN38. Id.; United States v. Guerra-Marez, 928 F.2d 665, 671 (5th Cir.1991).

[T]he purpose of [18 U.S.C. s 2518(1)(c)] "is not to foreclose electronic surveillance until every other imaginable method of investigation has been successfully attempted." United States v. Webster, 734 F.2d 1048, 1055 (5th Cir.1984). Rather, the section "is designed to inform the issuing judge of the difficulties involved in the use of conventional techniques and to insure that wiretapping is not resorted to in a situation in which traditional investigative techniques will suffice to expose crime." Id.

With these considerations in mind, we have held that "[i]t is enough if the affidavit explains the prospective or retrospective failure of several investigative techniques that reasonably suggest themselves." United States v. Hyde, 574 F.2d 856, 867 (5th Cir.1978). [FN39]

FN39. United States v. Collins, 972 F.2d 1385, 1412 (5th Cir.1992).

In this circuit, the courts "take a 'common sense view' of the statements contained in the application to determine if the necessity requirement is satisfied." [FN40]

FN40. United States v. Guerra-Marez, 928 F.2d 665, 670 (5th Cir.1991), cert. denied, 502 U.S. 917, 112 S.Ct. 322, 116 L.Ed.2d 263 (1991) (citation omitted).

[7] This Court finds that the application presented to Judge Walter met this standard. The affidavit stated that normal investigative techniques were either tried, used or unlikely to succeed in gathering enough evidence to prosecute the suspected activity. The affidavit also gave a detailed account of the investigative techniques used by the agents. Some of the reasons set forth in the affidavit for the necessity of the wiretap were (1) the covert nature of the offense; (2) the nature of the relationship between the parties; (3) the lack of direct physical evidence of crimes of the nature of those alleged; and (4) the lack of sufficient detail from pen *401 registers alone. These reasons are more than sufficient to show that the wiretap order was reasonable and necessary under the circumstances. [FN41]

FN41. The Fifth Circuit has affirmed wiretap orders based on similar affidavits. See United States v. Bankston, 182 F.3d 296, 306 (5th Cir.1999), cert. granted in part by Cleveland v. United States, 529 U.S. 1017, 120 S.Ct. 1416, 146 L.Ed.2d 309 (2000) (No. 99-804); United States v. Krout, 66 F.3d 1420, 1425 (5th Cir.1995), cert. denied, 516 U.S. 1136, 116 S.Ct. 963, 133 L.Ed.2d 884 (1996); United States v. Collins, 972 F.2d 1385, 1412 (5th Cir.1992), cert. denied, 507 U.S. 1017, 113 S.Ct. 1812, 123 L.Ed.2d 444 (1993).

[8] Finally, the defendants argue that there was no basis for Judge Walter to grant an extension of the June 26, 1996 order. To the extent the defendants' argument is based on their contention that the original application was defective, the Court finds this argument to be without merit for the reasons previously

given. The Court further finds that Judge Walter acted reasonably in extending the initial order. The Court cannot say that Judge Walter acted in an arbitrary manner in extending the original order under the facts of this case. The record clearly indicates that Judge Walter was presented with detailed oral and written progress reports every ten days which set forth the nature of the intercepted conversations. "Where the authorizing judge has required and reviewed such reports at regular intervals, a reviewing court may take such supervision through reports into consideration in determining whether a reasonable effort to minimize was attempted." [FN42] The record in this case reveals that Judge Walter was informed of the number of intercepted calls, the nature of the calls, the number of calls minimized and the number and type of calls the government considered to be criminal. Based on his evaluation of this information, Judge Walter concluded the government was acting in a proper manner. The affidavits, supplemented by logs, tapes and progress reports, provide more than adequate information for the issuing judge to rely on in determining whether to extend an order. A reviewing judge may also review this information in determining whether the issuing judge was arbitrary in granting extensions.

FN42. United States v. Armocida, 515 F.2d 29, 45 (3rd Cir.), cert. denied, 423 U.S. 858, 96 S.Ct. 111, 46 L.Ed.2d 84 (1975).

Defendants strenuously argue that since no crime was committed with respect to the Jena Project, there was no need for any extension. The Court believes that there was sufficient information presented to Judge Walter for him to conclude there was evidence of criminal activity to justify the extension of the original order. The evidence obtained by the FBI during the subsequent monitoring of the phones and other independent evidence obtained support Judge Walter's decision to grant the multiple extensions of his initial order.

This Court has no doubt that, in light of all of these considerations, Judge Walter acted in a reasonable manner in initially granting and then extending his surveillance orders. The facts clearly show that Judge Walter did not act in an arbitrary manner in extending his surveillance orders.

Considering the totality of the circumstances of this case, the Court finds:

(1) The surveillance order issued by Judge Walter on June 26, 1996 was supported by probable cause and was in compliance with 28 U.S.C. 2510- 2522.

(2) There was no substantial showing made that the FBI agents knowingly and intentionally or with the reckless disregard for the truth made a false statement or caused omissions to be made in the warrant affidavits;

(3) If there were errors or omissions in the affidavit, the corrected information and/or additional information did not affect the quantum of probable *402 cause found to be present by Judge Walter.

(4) There was and is no need for a Franks hearing.

(5) Judge Walter was not arbitrary in issuing the June 26, 1996 order and the various extensions of the order, and

(6) The extension granted by Judge Walter were proper.

Therefore, defendants' motion to suppress evidence resulting from the June 26, 1996 surveillance orders and extensions thereof must be denied.

The Electronic Surveillance of Edwin Edwards' Home

Contentions of Parties

Judge Parker authorized a wiretap on Edwin Edwards' home telephone on October 18, 1996. Defendants seek to suppress any evidence obtained from this wiretap on several grounds. Defendants also challenge the validity of the surveillance order issued by Judge Walter. This contention is without merit for

reasons previously given in this opinion. Additionally, defendants contend that the affidavit submitted to Judge Parker was misleading and contained errors and other mistakes.

The government acknowledges a mistake occurred regarding the June 27, 1996 telephone conversation. However, the government also contends there was sufficient evidence to establish that Edwin Edwards was using his home phone for criminal activity.

Defendants also contend in motions filed during and after the trial that Agent Santini admitted during his trial testimony that other errors or omissions were made in his affidavit. The government contends these errors and omissions do not negate the necessary probable cause which Judge Parker found when he issued his initial wiretap order.

The government also argues, and the Court agrees, that Judge Parker was provided with 10-day written and oral reports and was able to draw his own conclusion and understanding of the facts despite the errors claimed by the defendants.

Discussion

[9] The Court has previously discussed the standard by which a reviewing court evaluates whether the initiating judge was arbitrary in his decision to issue a wiretap order. This discussion will not be repeated here. After carefully considering the entire record, the Court finds that no Franks hearing is required under the facts of this case. The Court further finds that Judge Parker properly found there was probable cause to believe that Edwin Edwards had committed, was committing or would commit a crime and that particular communications concerning the offense would be obtained through wiretap interceptions. In short, the Court finds that Judge Parker was not arbitrary in issuing his orders under the totality of the circumstances of this case. Furthermore, the Court finds the errors or omissions which are

alleged, even if corrected or added to the affidavit, would not disturb the probable cause finding made by Judge Parker.

In a separate part of this opinion, the Court sets forth in detail the standards required for searching a home. These same standards apply to the issuance of a wiretap order on a home telephone. Applying these standards to the issue now before the Court, the Court finds that there was sufficient information in Agent Santini's affidavit for Judge Parker to find probable cause to believe that Edwin Edwards used his home phone to further the Jena scheme. [FN43]

FN43. See Santini affidavit, para. 51, 54, 67 and 140.

The affidavit submitted by Agent Santini referred to telephone conversations between Cecil Brown and Edwin Edwards which establish probable cause to believe Edwin Edwards was a participant in and *403 had knowledge of Cecil Brown's scheme. [FN44] Furthermore, in paragraph 54 of Agent Santini's affidavit, there is a specific reference to a July 16, 1996 telephone call between Edwin Edwards and Cecil Brown on Edwin Edwards' home phone, which together with a July 14, 1996 conference between Patrick Graham and Cecil Brown suggests a scheme to pay money to Edwin Edwards on the Jena Project. There was another telephone call recorded on the Edwin Edwards home phone on October 2, 1996, which suggests evidence of criminal activity. [FN45] A careful review of the Santini affidavit establishes that Judge Parker did not err in concluding that Edwin Edwards was engaging in criminal activity at his home. This affidavit and the transcripts referred to in the affidavit more than established an adequate basis to obtain authorization for the installation of a wiretap on Edwin Edwards' home telephone. [FN46] This Court must give due deference to Judge Parker's evaluation of the evidence and his conclusion that probable cause existed to authorize the wiretap. The Court finds that Judge Parker did not act in an arbitrary manner when he signed his October 18, 1996 order.

FN44. Santini affidavit, para. 51, 153-158; Defense Exhibit 10-B.

FN45. See Santini affidavit, pp. 66 and 67; Defense Exhibit 10-B and 11.

FN46. There was also evidence set forth in the affidavit regarding Edwards' intent to call Richard Stalder regarding the Jena Project. (Defense Exhibit 10-D, Santini affidavit, para. 17). There were also references to meetings held at Ruth's Chris Steak House and later at the Edwards home. (Santini affidavit, para. 74). The affidavit states that after dinner, Graham gave Cecil Brown $100,000. Cecil Brown then went to Edwards' home, according to the affidavit.

The defendants further contend that Judge Parker erred in granting thirty-day extensions of his initial order. Defendants contend that "the federal agents sought to extend the authorization based upon a handful of intercepted communications, none of which provided evidence of illegality." [FN47] This claim is without merit. There were sufficient calls made during this initial thirty-day period and during subsequent periods which established criminal activity on the Jena Project, the LRGC/NORC scheme, the 15th Riverboat Scheme involving Eddie DeBartolo and the Cascade Insurance scheme.

FN47. Defense brief, pp. 41-42.

The fact "that other criminal activity was disclosed by the communications, separate from that which provoked the surveillance, does not mean the monitoring was inappropriate." [FN48] Furthermore, it is clear that "the interception of conversations that may relate to offenses other than those specifically enumerated in the wiretap application and affidavit is acceptable if disclosed to the district judge." [FN49] The fact that other criminal activity was disclosed by the communications separate from that which provoked the wiretap order does not

mean the monitoring was inappropriate. The agents cannot and should not ignore such conversations. This is particularly true "when the government reports these potentially criminal investigations to the authorizing judge, and the judge implicitly authorizes the monitoring to continue." [FN50] Such implied authorization satisfies the requirements of Section 2517(5). [FN51] Thus, where the authorizing judge receives progress reports and applications for extensions and the nature of the intercepted conversations are disclosed, *404 the judge's review of the material and his acceptance of an extension constitutes a determination that the conversations were properly intercepted. [FN52]

FN48. United States v. Cleveland, 964 F.Supp. 1073, 1095 (E.D.La.1997) (quoting United States v. Davis, 1995 WL 608464 at *2 (E.D.La., Oct. 13, 1995)).

FN49. Cleveland, 964 F.Supp. at 1095; United States v. Masciarelli, 558 F.2d 1064, 1067 (2nd Cir.1977).

FN50. Cleveland, 964 F.Supp. at 1096-97.

FN51. United States v. Cleveland, 1997 WL 208937 at *4 (E.D.La. Apr. 28, 1997). There is a typographical error in the Cleveland opinion which refers to Section 2517(5) as 2817(5). The remainder of the opinion correctly cites Section 2517(5).

FN52. United States v. Van Horn, 789 F.2d 1492, 1503-04 (11th Cir.), cert, denied, 479 U.S. 854, 107 S.Ct. 190, 93 L.Ed.2d 123 (1986).

Judge Parker's decision to extend his initial order was based on his review of information submitted to him which included possible criminal activity involving Jena, [FN53] calls from Eddie DeBartolo regarding contact with and votes of the Gaming Board, [FN54] and the Cascade Insurance scheme. [FN55] It cannot be said that Judge Parker acted in an arbitrary manner

when he decided to extend the October 18, 1996 order based on the totality of the facts he had available for his review at the time he made his decision to extend the order.

FN53. Defense Exhibit 10-D, Santini affidavit, para. 17-21.

FN54. Call # 6 (October 18, 1996); Call # 489 (November 6, 1996). It is true the significance of these calls was not determined until later.

FN55. The full details of this scheme were later set forth in Santini's affidavit of December 17, 1996.

The defendants also object to subsequent extensions granted by Judge Parker. The defendants argue that there was no evidence of any crime committed to justify these extensions. The defendants' arguments are not supported by the evidence. A summary of the evidence available to Judge Parker is appropriate. It is true that during the subsequent extensions, there were few calls involving the Jena and Evergreen Projects. However, there was an extensive amount of evidence involving the Hollywood/DeBartolo matter and Cascade Insurance. In fact, some of these conversations were quoted in the indictments returned by the grand jury in the riverboat gaming case and the Cascade Insurance case. During February of 1997, conversations were intercepted involving Robert Guidry and the Treasure Chest scheme. [FN56]

FN56. Santani affidavit pars. 40-43; Defense Exhibit 10-J.

There was a period of time from November 1996 to January 1997 when the calls were minimal because of Edwin Edwards' absence from his home and for other reasons. These facts were disclosed to Judge Parker. The fact that Edwin Edwards was temporarily absent from his home does not mean there was no probable cause for additional extensions. [FN57] In fact, the monitoring was terminated on January 21, 1997 and was not

resumed until later in February. Giving Judge Parker the deference to which he is entitled, the Court finds there was probable cause to extend the October 18, 1996 order. Under the totality of the circumstances of this case and based on the information provided to and reviewed by Judge Parker, the Court finds Judge Parker did not act in an arbitrary manner when he initially issued and subsequently extended his surveillance order.

FN57. See United States v. Van Horn, 789 F.2d 1492 (11th Cir.), cert, denied, 479 U.S. 854, 107 S.Ct. 190, 93 L.Ed.2d 123 (1986).

The Electronic Surveillance of Edwin Edwards at his law office

The Court now turns to a discussion of the electronic surveillance which occurred at the law office located on Jamestown Avenue. Defendants' Arguments [FN58]

FN58. Rec. Doc. No. 461, pp. 87-105.

The defendants argue that there was no probable cause to believe Edwin Edwards' law office had been, was or would be used to commit any criminal activity. The defendants contend that the government failed to present sufficient evidence of criminal activity in the Title III application and supporting affidavit submitted to Judge Parker on December 6, 1996 to justify the surveillance order. The defendants *405 further argue that the application and affidavit only list twelve references to activity at the Jamestown Avenue law office building. Of those twelve references, defendants contend that several involved discussions of innocuous subjects like lunch plans and travel directions. Since none of the references to meetings or conversations which occurred in the Jamestown Avenue office building suggest any criminal activity, defendants claim that the application and supporting affidavit do not satisfy the appropriate probable cause standard.

Government's Response [FN59]

FN59. Rec. Doc. No. 564, pp. 48-52.

The government contends that there was sufficient probable cause to authorize electronic surveillance of Edwin Edwards' office. The government further argues that there was sufficient evidence of criminal activity at the law office to support the government's request for a wiretap.

Discussion

[10] The government has highlighted a number of conversations and meetings that either occurred at the law office of Edwin Edwards or were sufficiently related to the office to support probable cause. The Court has previously found sufficient probable cause for the surveillance order issued by Judge Walter on Cecil Brown's home and office. To the extent the defendants challenge the order issued by Judge Parker on December 6, 1996 on this ground, the motion is denied. There is sufficient probable cause to establish evidence of criminality insofar as the Jena and Evergreen Projects were concerned.

Furthermore, looking at the totality of the circumstances and giving due deference to Judge Parker's evaluation of the evidence before him, the Court concludes there was probable cause for Judge Parker to issue his December 6, 1996 order. The Santini affidavit refers to matters in addition to those captured on the Cecil Brown wiretaps. This includes meetings with Cecil Brown and Pat Graham on July 2, 1996 and the notation of $1,020,000 on the back of a proposed contract. [FN60] Furthermore, there is a reference in paragraph 47 of the Santini affidavit regarding a telephone call of October 2, 1996 between Cecil Brown and Edwin Edwards. During this phone call, there was a reference to a "75/25 heifer" discussion between Cecil Brown and Edwin Edwards as well as the Stalder discussion. [FN61] The government also sets forth in the Santini affidavit that a meeting

was set on October 10, 1996 for the transfer of $100,000 at Ruth's Chris Steak House. The government alleges that the cash was later transferred at Edwin Edwards' home. An $8,000 check was brought to Edwin Edwards' office on October 15, 1996. [FN62] The inferences that can be drawn from these conversations, meetings, transfers, and other actions justify and support Judge Parker's determination of probable cause. These examples of alleged criminal activity were presented to Judge Parker as evidence of probable cause and properly formed the basis for his decision to authorize electronic surveillance of the office.

FN60. Santini affidvit, para. 29, Defense Exhibit 12-B.

FN61. See also Santini affidavit, para. 49.

FN62. See Santini affidavit, para. 54.

The Court concludes that there was sufficient probable cause to believe Edwin Edwards' office on Jamestown Avenue had been, was and would continue to be used for criminal activity. Taking into account the totality of the circumstances presented to Judge Parker, the Court finds that the government met its burden in establishing probable cause. [FN63] Therefore, the fruits of this surveillance shall not be suppressed.

FN63. See United States v. Bankston, 182 F.3d 296, 305-06 (5th Cir.1999), cert. granted in part by Cleveland v. United States, 529 U.S. 1017, 120 S.Ct. 1416, 146 L.Ed.2d 309 (2000) (No. 99-804); United States v. Gonzales, 866 F.2d 781, 786-87 (5th Cir.), cert. denied, 490 U.S. 1093, 109 S.Ct. 2438, 104 L.Ed.2d 994 (1989).

*406 The Court previously set forth the requirements for probable cause under 18 U.S.C. s 2518. [FN64] The essence of the initial probable cause inquiry is a "common sense" analysis based on the entire picture presented to the authorizing judge.

[FN65] This Court has evaluated the defendants' motion to suppress the fruits of the surveillance relative to Edwin Edwards' office and finds that the application and affidavit established a fair probability that the surveillance would yield evidence of criminal activity. [FN66] The Court reaches this conclusion based on the totality of all the circumstances presented to Judge Parker. Specifically, the Court is convinced that the nearly eighty paragraphs set forth in Agent Santini's supporting affidavit sufficiently detail alleged conversations, meetings and connections between Edwin Edwards, Cecil Brown and other participants to support a finding of probable cause that those persons were engaged in the alleged criminal activities listed in the Title III application.

FN64. For a general discussion of probable cause in Title III cases, See supra text accompanying notes 10-19.

FN65. See United States v. Hyde, 574 F.2d 856, 863 (5th Cir.1978); United States v. Guerra-Marez, 928 F.2d 665, 670 (5th Cir.1991).

FN66. See Gonzales, 866 F.2d at 786.

The December 6, 1996 affidavit submitted in support of the government's Title III application described part of a broad criminal scheme that allegedly involved Edwin Edwards and some of the other named defendants, as well as other participants. Agent Santini compiled information gleaned from wiretaps conducted on defendant Cecil Brown's telephone, as well as evidence obtained from consensual recordings by a cooperating Government witness. The affidavit presented Judge Parker with information about two alleged schemes that involved bribes and illegal payments to Edwin Edwards through Cecil Brown in connection with Edwin Edwards' exerting influence based on his status as the former governor of the state of Louisiana. Agent Santini's description of these two schemes sufficiently establishes probable cause to support the Title III

authorization.

Agent Santini delineated in his affidavit the scheme referred to as the "Jena Project", which involved contracts relating to the construction of a private juvenile prison in Jena, Louisiana. [FN67] According to Agent Santini, Cecil Brown, Edwin Edwards and the cooperating witness [FN68] frequently discussed Edwin Edwards' role in influencing the contract process for construction of the Jena facility. [FN69] On one occasion, Cecil Brown and the CW discussed payments to be made to Edwin Edwards in conjunction with Edwin Edwards' work on the Jena Project. Paragraph 26 of the affidavit describes the July 2, 1996 meeting:

FN67. Santani affidavit, para. 22-66.

FN68. The identity of the CW was not disclosed in the Government's Title III application (or at any point thereafter). However, in the course of filing pre-trial motions in this case, the identity of the CW was disclosed to be Patrick Graham.

FN69. These discussions took place in meetings or telephonically.

On July 2, 1996, the CW met with CECIL BROWN in Eunice, Louisiana, which was consenually recorded at the direction of FBI Agents. The purpose of the meeting was to reach an understanding as to the final payment due to EDWARDS and BROWN at the closing of the Jena Juvenile Project. During the recorded conversation BROWN and the CW came to a figure of $1,020,000 of which EDWARDS would receive $1,000,000 and BROWN would receive $20,000 in cash. This was written by the CW on the back of the original "Contract" for "services" between VIEWPOINT DEVELOPMENT CORPORATION (FRED HOFHEINZ) and LOUISIANA CONSULTANTS, INC. (CECIL BROWN). After BROWN *407 agreed to the amount, the contract was taken to Attorney KENNETH PITRE by

BROWN and the CW which was consenually recorded. PITRE agreed to amend the contact and return it to BROWN who would take it to EDWIN W. EDWARDS for final approval. [FN70]

FN70. Santini affidavit, para. 26.

In September of 1996, Cecil Brown and the CW discussed payment of $100,000 indirectly (through Cecil Brown) to Edwin Edwards in exchange for Edwin Edwards' assistance in communicating with Richard Stalder, Secretary of the Louisiana Department of Public Safety and Corrections. [FN71] The confidential witness referred to this $100,000 sum as "heifers", which he planned to obtain from another business deal in Miami. [FN72] The reference to "heifers", or payment to Edwin Edwards indirectly, appears in the transcript of a conversation recorded between Cecil Brown and Edwin Edwards that took place on October 2, 1996: [FN73]

FN71. Santini affidavit, para. 44-46.

FN72. Santini affidavit, para. 43. Based on his conversations with the confidential informant, Santini believed the term "heifer" referred to cash payments.

FN73. The abbreviations used in this excerpt ("EE" and "CB") refer to Edwin Edwards and Cecil Brown, respectively.

EE: Hello.
CB: Hey boss.
EE: Yeah
CB: What's going on?
EE: Not much
CB: You busy?
EE: No, I'm sorry I don't recognize your voice.
CB: Cecil.
EE: Yeah Cecil. How you?
CB: Okay. Real good. Uh, my uh, my buddy from Houston.

EE: Yeah.
CB: He, uh, we may need a phone call or something from um you to STALDER just to test the water. Uh, I'll explain to you Monday when I go.
EE: Call?
CB: Uh, do you see any problem there?
EE: Uh, I don't know. It depends on what you want me, uh, what you want me to do.
CB: Okay, I'll explain more. But, uh, what it is, its that advance that I told you about that I would get and it naturally would come back out of my pay, uh on the backside when I get paid. But it would, if we can make, I'll explain to you when I go there Monday. Are you going to be busy Monday?
EE: Well, I'm not going to be in 'til Monday afternoon.
CB: When will you be in?
EE: Uh, well I, I guess sometime early in the early afternoon Monday.
CB: Um-huh. But you're leaving early afternoon Monday?
EE: No, I'm leaving uh, tomorrow and I'm coming back Monday afternoon.
CB: Okay.
EE: Why don't you come on Tuesday morning? (October 8, 1996)
CB: Okay, good.
EE: Okay.
CB: Alright.
EE: Alright.
CB: Mighty fine. I'll explain it. It's not, it's not a big deal.
EE: Alright.
CB: Okay...anyway, on this other deal we talking about 75 heifers and 25 heifers.
EE: Alright.
CB: Okay.
EE: Okay, I'll see you Tuesday. (October 8, 1996)
CB: Yeah, that's what we had talked about.
EE: Good.
*408 CB: Bye. [FN74]

FN74. Santini affidavit, para. 47.

Agent Santini then enumerates in his affidavit the events occurring in response to the October 2, 1996 conversation between Cecil Brown and Edwin Edwards. Cecil Brown and Edwin Edwards met on October 8, 1996 at Edwin Edwards' law office. [FN75] Later that same day, Cecil Brown and the CW discussed exactly what questions Edwin Edwards should ask in his conversation with Stalder, as well as assurances that Edwin Edwards would use language to convince the CW's partners that Edwin Edwards intended to exert his influence on the Jena Project. [FN76] The CW also expressed his concern that Edwin Edwards might "scare the people off." [FN77]

FN75. Santini affidavit, para. 50.

FN76. Santini affidavit, para. 50.

FN77. Santini affidavit, para. 50. Santini explained that this conversation and the reference to "scaring people off" was evidence of Edwin Edwards' intent to improperly influence the Jena Project. In this conversation, Cecil Brown was informing the CW (on behalf of Edwin Edwards) that "EDWARDS would provide proof to the CW's partners that EDWARDS could use his political influence with current Louisiana appointed or elected public officials to prevent the Jena Project from closing." In addition, Santini "asserts that the conversation corroborates the CW's information to the FBI that $75,000 of the forthcoming bribe payment will be paid to EDWARDS for EDWARDS' continuing participation in and assistance provided to the CW's Jena Project." Santini affidavit, para. 50.

The Santini affidavit also lays out an alleged plan by Edwin Edwards to extort money from a Texas corporation wishing to do business in Louisiana, which is referred to as the "Evergreen Project." According to Santini's affidavit, [FN78] the CW and persons acting on behalf of Texas based Evergreen Global

Resources Corporation ("EGR"), discussed Edwin Edwards' ability to influence state regulatory approval for EGR's projects in Louisiana and linked the approval (or lack of approval) to a payment of $500,000 payable to Edwin Edwards via Cecil Brown. In addition, the affidavit detailed another allegation that Edwin Edwards and others would receive additional extortionate payments, sometimes referred to as "points." [FN79]

FN78. Santini affidavit, para. 67. Santini's affidavit incorporated other affidavits by reference.

FN79. Santini affidavit, para. 70, 71.

According to the statements in Agent Santini's affidavit, Edwin Edwards and Cecil Brown attempted to conceal the Evergreen bribe payments to Edwin Edwards through Cecil Brown by using a fraudulently created contract. [FN80] Regarding this contract, the affidavit recounts a telephone conversation between Cecil Brown and Guy Thompson, a Houston business man believed to represent Evergreen. Santini described the July 2, 1996 conversation saying:

FN80. See Santini affidavit, para. 76, for explanation of the attempt to conceal the bribe payments in the form of a legitimate contract.

Brown said he was getting heat from his partner (believed to be EDWIN EDWARDS), who said he did his part and got the thing lined up as well as New Orleans. He (EDWARDS) told Brown to get the goddamn contract over to him. BROWN told THOMPSON when he talks to him like that he does not ask him to do anything further until he (BROWN) carries out his part. * * * BROWN asked THOMPSON "once they get the plant, then some type of payments would start?" THOMPSON replied "as soon as they get one signed, sealed and delivered." (Affiant asserts that the telephone call from THOMPSON in Texas to BROWN in Louisiana in furtherance of the bribes paid to

EDWARDS would be a violation of Title 18, United States Code Section 1952, and the payment of $100,000 bribe to EDWARDS, then Governor of the State of Louisiana, to allow this fraudulent scheme to go forward, would be a violation *409 of Title 18, United States Code, Section 1951.) [FN81]

FN81. Santini affidavit, para. 68.

On July 19, 1996, a conversation was intercepted on Cecil Brown's telephone which further explained the alleged use of the fraudulently created contract and the additional "points", or bribe payments, that Edwin Edwards would receive. Santini described the call as follows:

> BROWN said they got it and it's signed, sealed and delivered. BROWN said the big boss (EDWARDS) just checked it out the day before yesterday and he should have called JONES. BROWN said we got them and we got a good piece of it. JONES replied, alright and BROWN said they have five points. BROWN told JONES he would show him the contract because he (JONES) had one of the points. BROWN told JONES that he (JONES) has one of the points, his son-in-law (KARL DEROUEN) has one of the points and our friend (EDWARDS) east of here has two points. (Affiant asserts that "points" are additional monies that the victim of bribery extortion scheme (sic) are required to pay to EDWARDS, BROWN, JONES, DEROUEN and others.) [FN82]

FN82. Santini affidavit, para. 70.

The Court finds that the above references, as well as the entire factual scenario presented to Judge Parker, sufficiently established probable cause to believe that Edwin Edwards was

involved in the criminal activities alleged in the December 6, 1996 application and supporting affidavit. [FN83] The defendants strenuously argue that there is no connection between any of the alleged criminal activity outlined in the December 6, 1996 affidavit and Edwin Edwards' law office. [FN84] As a result, the December 6, 1996 authorization did not satisfy the requirement that the location where the communications were to be intercepted "[were] being used, or [were] about to be used, in connection with the commission of such offense." [FN85] The defendants argue this is an additional reason to conclude that any evidence obtained from Edwin Edwards' office should be suppressed.

FN83. In the December 6, 1996 application and affidavit, the Government alleged that Edwin Edwards had committed and was committing mail and wire fraud (18 U.S.C. § 1341, 1343, 1346), extortion and conspiracy to commit extortion (18 U.S.C. § 1951), Interstate Travel or transportation in aid of RICO violations (18 U.S.C. § 1952) and conspiracy to commit all of those offenses (18 U.S.C. § 371).

FN84. Rec. Doc. No. 78.

FN85. 18 U.S.C. § 2518(3)(d).

The Court finds there was a logical connection between the Jena and Evergreen schemes alleged by the government and the Jamestown Avenue office building. Edwin Edwards met with Cecil Brown at and phoned Cecil Brown from the Jamestown Avenue office building. [FN86] In addition, Santini asserts that other meetings relating to the Jena and Evergreen schemes occurred at other locations, but are interrelated to the meetings that took place at the Jamestown Avenue office building. [FN87] The Court reaches the common sense conclusion that Edwin Edwards' office was likely being used to engage in the alleged criminal activities suggested by the government. The affidavit described multiple meetings between Cecil Brown and the CW

(and others) relating to the Jena and Evergreen schemes. Cecil Brown then met with Edwin Edwards and/or phoned him at the Jamestown Avenue office. It is logical to conclude that some of the meetings which were held at the Jamestown Avenue office building related to those other *410 conversations involving alleged criminal activity. [FN88]

FN86. See Santini affidavit, paras. 29, 32, 34, 41, 49, 54, 65, 93, 99.

FN87. For example, Santini explained that a October 8, 1999 conversation between Cecil Brown and the CW regarding Edwards' call to Secretary Stalder was a direct result of a meeting that took place at the office earlier the same day. Santini affidavit, para. 50.

FN88. The defendants emphasize that Santini's affidavit only refers to the Jamestown Avenue law office twelve times and that none of those references are criminal in nature. See Rec. Doc. No. 461, p. 80. As a result, the defendants conclude that the Government did not properly satisfy the probable cause showing under 18 U.S.C. 2518(3)(d) and suppression is warranted. The defendants cite a number of cases for the proposition that a court should grant a suppression motion when there is no evidence linking criminal activity to the premises searched. See Rec. Doc. No. 461, p. 79. The cases cited by the defendants are inapposite to the issue at hand. Without exception, these cases deal with search warrants and the Fourth Amendment requirements, not Title III electronic surveillance orders. Admittedly, the requirements of the Fourth Amendment and the requirements of Title III are very similar. However, there are some differences. Notably, § 2518(3)(d) contains a disjunctive requirement for probable cause as it relates to the place to be searched. Section 2518(3)(d) permits the judge to authorize surveillance when there is probable cause to believe that either the place to be searched is being used or is about to be used in the commission of a crime, or if the place is listed in the name of or is commonly

used by such person. Thus, even if the Court was not persuaded that Santini's affidavit presented a sufficient connection between Edwin Edwards' alleged schemes and the Jamestown Avenue office, the affidavit established that the Jamestown office was "commonly used" and "leased by" Edwin Edwards. The requirements of this section would, therefore, be satisfied.

As noted earlier, it is clear that Judge Parker reviewed the same evidence which this Court has reviewed and summarized. According Judge Parker the due deference to which he is entitled, and looking at the totality of the circumstances, the Court concludes that Judge Parker properly found probable cause to issue the surveillance order at Edwin Edwards' law office. Therefore, the defendants' motion to suppress the fruits of this order is denied.

The Electronic Surveillance of Stephen Edwards

Defendants also contend the electronic surveillance of Stephen Edwards was improper and not authorized by Judge Parker.

Defendant's Arguments [FN89]

FN89. Rec. Doc. No. 461, pp. 87-105.

The defendants raise three arguments in support of their motion to suppress the fruits of the electronic surveillance of Stephen Edwards. First, defendants argue that the language in Judge Parker's Title III order did not authorize surveillance in Stephen Edwards' office at the Jamestown Avenue building. According to the defendants, a Title III authorization must describe with particularity the place where communications will be intercepted. Communications may not be intercepted in locations that are not authorized by the issuing judge. Defendants contend that the precise language in the December 6, 1996 order only authorized interception of communications at "the law office of Edwin W. Edwards." Based upon the phraseology used, defendants argue

that this order did not permit interception of communications in any other offices, including Stephen Edwards' office. Without proper authorization, the defendants contend that the FBI illegally monitored conversations in Stephen Edwards' office. Second, the defendants argue that Judge Parker's order only authorized interception of conversations when Edwin Edwards or other named interceptees were present. According to the defendants, many conversations were recorded in Stephen Edwards' office when neither Edwin Edwards nor any of the other named interceptees were present. Therefore, defendants contend these conversations were recorded in violation of Judge Parker's order. Third, the defendants argue that even if Judge Parker's December 6, 1996 order did authorize interception in Stephen Edwards' office, the Title III application and supporting affidavit failed to provide sufficient probable cause to support the authorization. Thus, the defendants conclude that any evidence obtained from monitoring in Stephen *411 Edwards' office should be suppressed.

Government's Response [FN90]

FN90. Rec. Doc. No. 564, pp. 47-55.

The government argues that Judge Parker's December 6, 1996 order authorized interception of both Stephen and Edwin Edwards' office at the Jamestown Avenue office building. The government seeks to have the Court examine not only the strict language of Judge Parker's order, but also to consider the supporting affidavit submitted as part of the Title III application process. In particular, the government refers to statements in the supporting affidavit submitted by Agent Santini that informed Judge Parker that a listening device would be placed in both Stephen and Edwin Edwards' offices. The government also contends that the affidavit establishes that Edwin Edwards used different offices in the Jamestown Avenue building, including Stephen Edwards' office, to conduct business. In essence, the government urges the Court to consider the phrase "law office of

Edwin Edwards" broadly as used in the December 6, 1996 order. According to the government, Judge Parker intended the term to include the offices of both Stephen and Edwin Edwards. The government also disputes the defendants' argument that the FBI did not follow Judge Parker's Title III order. The government contends that surveillance only occurred in Stephen Edwards' office when Edwin Edwards or other named interceptees were present. Finally, the government contends that the application and supporting affidavit did present probable cause sufficient to support the interception order.

Discussion

The Court has thoroughly reviewed the applicable legal standards previously set forth in this opinion, the initial Title III application, the supporting affidavit submitted to Judge Parker and the arguments of the parties. In addition, the Court has considered the closing arguments of Dan Small, counsel for Edwin Edwards, which were made during the trial of the riverboat gaming case in deciding defendants' motion for reconsideration. The Court concludes that: (1) the language of Judge Parker's December 6, 1996 order did authorize interception in Stephen Edwards' office; (2) the interception did take place in conformity with the Title III order; and (3) the application and supporting affidavit adequately set forth probable cause to support the interception order. As a result, the fruits of the electronic surveillance of Stephen Edwards' office should not be suppressed.

The Court has considered the December 6, 1996 order and the initial affidavit presented to Judge Parker in support of the Title III authorization. As will be shown below, the facts support the conclusion that the application and affidavit presented Judge Parker with sufficient probable cause to support the decision to authorize interception under Title III. [FN91] Additionally, Judge Parker's order authorized interception of communications in the offices of both Stephen and Edwin Edwards at the Jamestown

Avenue office building.

FN91. See United States v. Bankston, 182 F.3d 296 (5th Cir.1999); United States v. Gaytan, 74 F.3d 545 (5th Cir.1996), cert. granted in part by Cleveland v. United States, 529 U.S. 1017, 120 S.Ct. 1416, 146 L.Ed.2d 309 (2000); United States v. Collins, 972 F.2d 1385 (5th Cir.1992), cert. denied, 507 U.S. 1017, 113 S.Ct. 1812, 123 L.Ed.2d 444 (1993); United States v. Guerra-Marez, 928 F.2d 665 (5th Cir.1991), cert. denied, 502 U.S. 917, 112 S.Ct. 322, 116 L.Ed.2d 263 (1991); United States v. Ashley, 876 F.2d 1069 (1st Cir.1989); United States v. Lambert, 771 F.2d 83 (6th Cir.), cert. denied, 474 U.S. 1034, 106 S.Ct. 598, 88 L.Ed.2d 577 (1985). It is incumbent on this Court to review the entire picture presented to Judge Parker that led to his decision to issue the December 6, 1996 order. The Fifth Circuit has indicated the request for a Franks type hearing implicitly involves an "exhaustive review" of the evidence and the supporting affidavits, as well as the application submitted. See Guerra-Marez, supra.

*412 [11] Each Title III electronic surveillance application must include a "particular description" of the location where the government proposes to intercept communications. [FN92] This language echos the command of the Fourth Amendment which requires that warrants "particularly describ[e] the place to be searched, and the persons or things to be seized." [FN93] In Maryland v. Garrison, [FN94] the Supreme Court explained the requirement as follows:

FN92. 18 U.S.C. § 2518(1) requires that each application shall include the following: (b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including: (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) except as provided in subsection (11), a particular description of the nature and location of the facilities from which or the place where the communication is to be

intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted. (Emphasis supplied.)

FN93. Title III's particularity requirement is consistent with the particularity requirement of the Fourth Amendment. United States v. Mesa-Rincon, 911 F.2d 1433 (10th Cir.1990). As a result, those cases outlining the contours of the Fourth Amendment are applicable to Title III cases. In fact, both parties acknowledge the similarity by citing both Fourth Amendment search warrant cases and Title III electronic surveillance cases in their memoranda. See Rec. Doc. Nos. 461 and 564. See also Clifford S. Fishman & Anne T. McKenna, Wiretapping and Eavesdropping, (2d.ed.1995) at s 1:6.

FN94. 480 U.S. 79, 107 S.Ct. 1013, 94 L.Ed.2d 72 (1987).

The Warrant Clause of the Fourth Amendment categorically prohibits the issuance of any warrant except one "particularly describing the place to be searched and the persons or things to be seized." The manifest purpose of this particularity requirement was to prevent general searches. By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit. Thus, the scope of a lawful search is "defined by the object of the search and the places in which there is probable cause to believe that it may be found." [FN95]

FN95. Id. at 84, 107 S.Ct. at 1016. See also Lafave, Search and Seizure s 4.5(a) (3rd ed.1996).

The Supreme Court's decision in Steele v. United States [FN96] is often cited by courts on this issue. In Steele, the

Supreme Court held that "[i]t is enough if the description is such that the officer with a search warrant can, with reasonable effort, ascertain and identify the place intended." [FN97]

FN96. 267 U.S. 498, 45 S.Ct. 414, 69 L.Ed. 757 (1925).

FN97. Id. at 503, 45 S.Ct. at 416.

Overall, the test of whether a warrant sufficiently describes the location to be searched is one of reasonableness, and "[t]echnical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area." [FN98]

FN98. United States v. Ventresca, 380 U.S. 102, 108, 85 S.Ct. 741, 746, 13 L.Ed.2d 684 (1965). See also United States v. Darensbourg, 520 F.2d 985 (5th Cir.1975).

Although a Title III application must contain a "particular description" of the premises, courts have not required that the application disclose the exact location of where devices will be placed. In United States v. Lambert, [FN99] the court found that the government was not required to disclose exactly where it intended to place a listening device in the defendant's home. The Title III application satisfied the particularity requirement by identifying the *413 location of the defendant's home using a street address and description of the building. The court concluded it was unwise to require any further specificity, noting:

FN99. 771 F.2d 83 (6th Cir.), cert. denied, 474 U.S. 1034, 106 S.Ct. 598, 88 L.Ed.2d 577 (1985).

[J]udges [should not] be presumed to have such familiarity with the ... premises in which [listening devices] are to be installed that a court should be required in its order to specify ... the appropriate location of the bug.... Were this to be required, a

judge, in consultation with law enforcement officers, might have to visit the premises to be entered and discuss ... the areas for installations. His order would then have to contain explicit directions as to how to proceed, with the risk that any deviation therefrom, created by unforeseen emergencies, would create a possibility of illegality. It would be most unseemly for the courts to invade the province of law enforcement agencies by assuming that their competence was greater than that of the agencies presumably skilled in their field. [FN100]

FN100. Id. at 91 n. 4 (citing United States v. Scafidi, 564 F.2d 633 (2d Cir.1977), cert. denied, 436 U.S. 903, 98 S.Ct. 2231, 56 L.Ed.2d 400 (1978)).

Even if the Court finds that the description of the premises in a search warrant is somewhat ambiguous, the warrant is not fatally flawed nor should the evidence automatically be suppressed. [FN101] In the Title III context, this principle should likewise apply. The focus of the Court's analysis should be to determine whether the Title III order gave the FBI sufficient information to determine what communications they were authorized to intercept and where they were authorized to intercept them.

FN101. United States v. Judd, 889 F.2d 1410 (5th Cir.1989); United States v. Prout, 526 F.2d 380 (5th Cir.), cert. denied, 429 U.S. 840, 97 S.Ct. 114, 50 L.Ed.2d 109 (1976); United States v. Melancon, 462 F.2d 82 (5th Cir.), cert. denied, 409 U.S. 1038, 93 S.Ct. 516, 34 L.Ed.2d 487 (1972).

[12] The application procedure, including the attachments provided to Judge Parker, supports the conclusion that Judge Parker understood the design of the Jamestown Avenue office building and intended to authorize surveillance in the entire office building. Agent Santini attached a copy of the FBI schematic of the Jamestown office building to the supporting affidavit. [FN102] The diagram clearly showed the layout of the office building as well as the location of the individual offices

located inside the building. Thus, the Edwards' offices comprised a distinct portion of the building. [FN103] The diagram indicated that Stephen and Edwin Edwards each had a distinct personal office within the Jamestown Avenue office building. [FN104]

FN102. Affidavit in Support of December 6, 1996 Application, Attachment "1."

FN103. Id. Emphasis supplied by the United States.

FN104. Id. See also, Government's brief, p.50 n.38.

The defendants vigorously argue that Judge Parker only authorized surveillance in Edwin Edwards' personal office because the December 6, 1996 order describes the premises as the "law office of Edwin Edwards." Considered in isolation, this argument seems plausible. However, when the Court examines all of the language in the application and supporting affidavit of Agent Santini, the Court concludes that this phrase should be understood more broadly to include the entire office building at 4621 Jamestown Avenue as well as the particular areas within the office described in the attachment.

First, Agent Santini drew a distinction in the supporting affidavit between the term "personal" office and the reference to the "law office of Edwin Edwards." The two are not used interchangeably and refer to different concepts. The following passage illustrates this distinction:

*414 On December 3, 1996, a separate cooperating witness (CW-3) advised that if an individual entered the front door of the law office and turned right at the reception desk, the first office on the right is the personal office of STEPHEN R. EDWARDS. The next office on the right down the hall is the personal office of EDWIN EDWARDS. (Affiant asserts that EDWIN W. EDWARDS' office is located in the front corner of the law office). CW-3 advised that EDWIN W. EDWARDS currently

conducts business in his personal office and on occasion in the office of STEPHEN R. EDWARDS. Monitoring devices will be placed in both offices, however, monitoring will only take place when EDWIN W. EDWARDS is present in one of the offices. (Attached hereto as "Attachment 1" is a diagram of the law office which was provided by the CW.) [FN105]

FN105. Affidavit in Support of December 6, 1996 Application, para. 107, p. 64.

As shown in the above passage, Agent Santini refers to "the law office" in a broad sense referring to the entire building on Jamestown Avenue. References by Agent Santini to the "personal offices" are references to the individual offices contained within the building itself. It is evident that Judge Parker recognized this distinction in the December 6, 1996 order, wherein he utilizes the broader term "law office" as opposed to the narrower term "personal" office.

Second, during oral argument, the defendants urged the Court to closely examine the language of Judge Parker's December 6, 1996 order. [FN106] They argued that this order authorized access to the entire "law office" only for the purposes of installing, maintaining, and removing the equipment, and not for intercepting conversations in Stephen Edwards' office. Implicit within the defendants' argument is the presumption that the term "law office" refers to the entire building, not just to the personal offices of Edwin or Stephen Edwards. Based on the facts as well as counsel's arguments during the hearing on November 11, 1999, the Court concludes that the December 6, 1996 order authorized installation, maintenance, removal, and monitoring in both Edwin and Stephen Edwards' personal offices in the Jamestown Avenue office building. [FN107]

FN106. Hearing on Defendants' Motion to Suppress, November 11, 1999.

FN107. It is clear that the government does not have to pinpoint the exact location of the intercepted conversations, but may identify the general location of the conversations. United States v. Mesa-Rincon, 911 F.2d 1433, 1440 (10th Cir.1990).

The government presented Judge Parker with the affidavit of Agent Santini in support of its December 6, 1996 application for electronic surveillance. [FN108] Agent Santini's affidavit informed Judge Parker that a listening device would be placed in Stephen Edwards' office at the Jamestown Avenue office building. In pertinent part, the affidavit provides:

FN108. Agent Santini had personal knowledge of a number of facts that make his affidavit highly relevant. First, he had knowledge about the ongoing federal investigation of Edwin Edwards, Cecil Brown and others. See Affidavit in Support of December 6, 1996 Application, Government Exhibit 12(b), para. 3. Second, he was aware of the identities of those persons being investigated and those having offices in the Jamestown Avenue building. See Affidavit in Support of December 6, 1996 Application, Government Exhibit 12(b), paras. 17-20. Third, Agent Santini was familiar with the layout of the Jamestown Avenue office. See Affidavit in Support of December 6, 1996 Application, para. 107, Attachment "1" (diagram of Jamestown Avenue office).

CW-3 advised that EDWIN W. EDWARDS currently conducts business in his personal office and on occasion in the office of STEPHEN R. EDWARDS. Monitoring devices will be placed in both offices, however, monitoring will only take place when EDWIN W. EDWARDS is present in one of the offices. (Attached hereto as "Attachment 1" is a *415 diagram of the law office which was provided by the CW.) [FN109]

FN109. Affidavit in Support of December 6, 1996 Application, para. 107, p. 64.

Despite the defendants' arguments to the contrary during the hearing held on November 11, 1999, Judge Parker clearly had knowledge that a listening device would be placed in Stephen Edwards' office. The defendants complain that because the December 6, 1996 order did not incorporate any language from Paragraph 107 of Santini's affidavit, Judge Parker could not have intended to authorize surveillance in Stephen Edward's office. [FN110] This argument is not persuasive. The jurisprudence unequivocally provides that both the authorizing judge and the reviewing judge must consider the totality of the circumstances presented by the Title III applicant, including the application itself and the supporting affidavits. [FN111] In the instant case, Judge Parker evaluated all the relevant facts in deciding to issue the December 6, 1996 interception order. [FN112]

FN110. Memorandum in Support of Defendants' Motion to Suppress Fruits of Wire, Oral and Electronic Surveillance, Rec. Doc. No 461, p. 89.

FN111. See supra note 18.

FN112. The defendants charged that the government deliberately attempted to mislead Judge Parker by burying the reference to placing the device in Stephen Edwards' office in the supporting affidavit. See Rec. Doc. No. 461, pp. 89-90. In addition, the defendants also intimate that Judge Parker may have overlooked Agent Santini's statement about monitoring Stephen Edwards' office. The defendants offer no support for either of these allegations. The Court believes the totality of this record shows that Judge Parker was very attentive to his responsibilities, and clearly supervised his orders.

Agent Santini's choice of terminology supports the position that Judge Parker authorized surveillance in the personal offices of both Stephen and Edwin Edwards. Santini stated that "monitoring devices will be placed in both offices." [FN113] His use of the plural "devices" is further evidence that Judge

Parker's order authorized the FBI to monitor communications in both offices. If the phrase "monitoring devices" is interpreted in isolation, a plausible explanation could be that the order authorized the FBI to place multiple devices within Edwin Edwards' personal office. However, the entire sentence supports a different conclusion. The Court finds that Judge Parker intended to authorize multiple devices because the surveillance would be conducted in both offices.

FN113. Santini affidavit in Support of December 6, 1996 Application, p. 64, para. 107.

Agent Santini's affidavit also contains several relevant points to support the conclusion that Edwin Edwards used other offices in the Jamestown Avenue building. Santini states that on one occasion, Edwin Edwards made a call to Cecil Brown from the phone located in Stephen Edwards' personal office. [FN114] In addition, Santini states that "CW-3 advised that Edwin Edwards currently conducts business in his personal office and on occasion in the office of Stephen Edwards." [FN115] Clearly, Judge Parker was presented with information supporting the conclusion that Edwin Edwards conducted business in both his personal office and the personal office of Stephen Edwards.

FN114. Affidavit in Support of December 6, 1996 Application, para. 52, p. 26.

FN115. Affidavit in Support of December 6, 1996 Application, para. 107, p. 64. CW-3 was personally familiar with the layout of the Jamestown law office. According to Santini's affidavit, the confidential witness (Graham) discussed business in Edwards' personal office on multiple occasions. See Santini Affidavit, p. 63 n.9.

This Court's conclusion is also supported by the closing argument Dan Small made to the jury at the close of the trial. [FN116]

FN116. Closing arguments, April 19, 2000.

Mr. Small argued: [FN117]

FN117. The description given by Mr. Small of the offices and method of operation Edwin Edwards and Stephen Edwards had at the law office on Jamestown Avenue is completely consistent with Judge Parker's order and the government's arguments made in response to defendants' motions.

*416 And then there's much ado that there's a fingerprint on an envelope. The government just ignores the facts on tapes that show Stephen Edwards and Edwin Edwards shared offices, shared office supplies. You hear from the tape they are back and forth from each other's offices all the time.

Judge Parker authorized the FBI to use all interior areas of the Jamestown office building to carry out its electronic surveillance of Edwin Edwards and the other named interceptees. In the December 6, 1996 order, Judge Parker authorized the following:

> IT IS FURTHER ORDERED that Special agents of the FBI are authorized to obtain access to all interior areas of the premises known as the law office of Edwin W. Edwards, located at 4621 Jamestown Avenue Baton Rouge, Louisiana either openly or by surreptitious and covert means, as many times as is deemed necessary for the purpose of installing, maintaining, repairing and eventually removing electronic equipment which will permit interception of oral communications and for the purpose of ensuring effective interception, transmission, and recording of oral communications occurring at the above described location .... [FN118]

FN118. Order Authorizing the Interception of Oral Communications, December 6, 1996, p. 4.

Defendants argued during the hearing held on November 11, 1999 that Judge Parker authorized access to the entire premises solely for the purposes of installing, maintaining and repairing the equipment. According to the defendants, this authorization did not extend to recording or monitoring communications. The Court rejects this argument. To adopt defendants' argument would require an awkward reading of Judge Parker's order. The Court finds that it is illogical to interpret the phrase "law office of Edwin Edwards" as permitting access to the entire premises for installation, maintenance and removal purposes, while interpreting the same phrase as only referring to Edwin Edwards' personal office for monitoring purposes. The facts also dispute such a reading of the order.

Despite the defendants' attempts to analogize the Jamestown Avenue office building to an apartment building or similar type of building, the Court finds that describing the building as the "law office of Edwin Edwards" was sufficiently particular to satisfy Title III requirements. The defendants compare the structure of the Jamestown Avenue office building to a multiple tenant apartment building or a similar multi-tenant building. [FN119] Consequently, the defendants rely upon jurisprudence that requires a warrant to particularize which unit or apartment within a multi-unit building will be searched. The diagram submitted with Santini's affidavit is contrary to this analogy. The Court believes there is a distinction between multi-unit buildings with completely separate entrances and the building at issue in the present case. As the diagram indicates, the Jamestown Avenue office building is not subdivided into multiple units. The tenants in the Jamestown Avenue building share a common entrance, as well as other common facilities such as a library, a kitchen and a secretarial area. [FN120]

FN119. Rec Doc. No. 461, pp. 100-101.

FN120. The multi-tenant and apartment cases cited by the defendants are distinguishable. For example, in United States v. Votteller, 544 F.2d 1355 (6th Cir.1976), the court found that a motion to suppress should have been granted because the order failed to particularly describe the location to be searched. The premises searched in Votteller stand in stark contrast to the premises in the present case. Votteller involved a three story building with a bar on the first floor and multiple apartments on the other two floors. Similarly, the Second Circuit invalidated a search where the description of the premises only referred to a street address. The court reasoned that the description failed to allow the officers to distinguish between a clothing store on the ground floor of the building and the apartments located on the upper floors. United States v. Bermudez, 526 F.2d 89 (2nd Cir.), cert. denied, 425 U.S. 970, 96 S.Ct. 2166, 48 L.Ed.2d 793 (1975). The cases cited by the defendants are not applicable under the facts of this case.

*417 Defendants also argue that the government failed to abide by certain restrictions set forth in the December 6, 1996 order, thus warranting suppression. Judge Parker's order contained the following limits on interception:

> IT IS FURTHER ORDERED that the interception of oral conversations that occur within the target premises take place only when one of the named interceptees are within the target premises and are engaged in conversation or activity with any named or known coconspirator or any other individual that was caused to go to the target premises by a named interceptee or named or known coconspirator related to the criminal offenses as set forth in Paragraph A. [FN121]

FN121. December 6, 1996 Title III order issued by Judge Parker, p. 4, submitted as Government's exhibit 12(c).

The government contends that only two relevant conversations involving Stephen Edwards were recorded in the first ten days following the effective date of Judge Parker's December 6, 1996 authorization. [FN122] Thereafter, Judge Parker authorized the government to continue intercepting conversations of Stephen Edwards, irrespective of whether Edwin Edwards or any other named interceptee was present in the office. [FN123] The government maintains that during the first ten days of the authorization, there were only two pertinent conversations recorded in which Stephen Edwards was a participant. These occurred on December 19, 1996 and December 20, 1996. According to the government, the December 19 conversation was properly intercepted because it involved Edwin and Stephen Edwards. The December 20 conversation was properly intercepted because it involved three named interceptees and Stephen Edwards. Upon the filing of the first ten-day report to Judge Parker on December 27, 1996, Judge Parker was informed of Stephen Edwards' status as a co- conspirator. Judge Parker orally authorized the government to monitor conversations in Stephen Edwards' office regardless of Edwin Edwards' presence. [FN124] As to any conversations recorded after December 27, the government maintains the recordings were authorized by Judge Parker's December 27 oral authorization to continue intercepting communications in Stephen Edwards' office regardless of whether Edwin Edwards or any other named interceptees were present. On January 15, 1997, the first 30-day extension was granted and Stephen Edwards was named as an interceptee.

FN122. Judge Parker's order, although signed on December 6, 1996, was not effective until December 16, 1996. No recording took place until that date. As a result, the conversations the defendants object to took place within the first ten days of the authorization.

FN123. Government's Response in Opposition to Defendants' Motion to Suppress Wiretap Evidence and Request for an

Evidentiary Hearing, Rec Doc. No. 564, p. 53.

FN124. See United States v. Cleveland, 964 F.Supp. 1073 (E.D.La.1997), aff'd 182 F.3d 296 (5th Cir.1999), where the broadened scope of the investigation was implicitly authorized where the supervising judge was advised of progress of the investigation through detailed progress reports. See also United States v. Van Horn, 789 F.2d 1492, 1503-04 (11th Cir.), cert. denied, 479 U.S. 854, 107 S.Ct. 190, 93 L.Ed.2d 123 (1986).

The defendants also argue that there was no probable cause to believe that any of the offices in the Jamestown Avenue office building, including Stephen Edwards' office, had been, was or would be used for criminal activity. Consequently, even if the wording of Judge Parker's December 6, 1996 order permitted interception in Stephen Edwards' office, there *418 was no probable cause to issue the Title III order.

The Court has previously addressed the standard for probable cause. The Court finds that there was adequate probable cause to support Judge Parker's decision to issue the December 6, 1996 intercept order. The defendants attempt to divide the probable cause inquiry. First, defendants argue that no probable cause existed to support interception anywhere in the Jamestown Avenue office, thereby precluding any basis for intercepting conversations in Stephen Edwards' office. Second, defendants argue that there was no independent probable cause to support interception in Stephen Edwards' personal office. Under either argument, the defendants conclude that the interceptions in Stephen Edwards' office were illegal, and that the fruits of the surveillance should be suppressed.

The Court sees no reason to divide the probable cause inquiry as the defendants suggest. There was adequate probable cause to support electronic surveillance in both Edwin and Stephen Edwards' offices. Judge Parker's determination is adequately supported by the record. The affidavit contains references to

multiple conversations that took place at the Jamestown Avenue office between Edwin Edwards, Cecil Brown and Patrick Graham. These conversations support a finding of probable cause that criminal activity had and was taking place and would continue to take place at the law office. The Court finds that the affidavit supporting the application sufficiently satisfied probable cause based upon the totality of the circumstances presented to Judge Parker.

The Court need not reach the issue of whether the facts supported independent probable cause for Stephen Edwards' office alone. There was sufficient probable cause to believe that Edwin Edwards was conducting criminal activity in the Jamestown Avenue office building. The December 6, 1996 affidavit and Mr. Small's closing argument established that Edwin Edwards at times used other areas in the Jamestown Avenue office building to conduct meetings and make and receive telephone calls. Therefore, Judge Parker's order properly authorized interception in Stephen Edwards' office as one of those "other" offices.

In summary, the Court finds that the motion to suppress evidence obtained from the monitoring of Stephen Edwards' conversations must be denied.

The Court will now turn to a discussion of the motions to suppress evidence seized pursuant to search warrants issued by Judge Parker.

The Searches of the Residences of Edwin Edwards and Stephen Edwards, of the Office at 4621 Jamestown Avenue, and the Safe Deposit Boxes at Regions Bank and City National Bank

Edwin Edwards and Stephen Edwards challenge the validity of the search warrants issued for the searches of their residences, the office at 4621 Jamestown Avenue, and safe deposit boxes located at Regions Bank and City National Bank. A brief

recitation of the facts is in order.

On April 26, 1997, Judge Parker signed warrants authorizing the search of the residences of Stephen Edwards and Edwin Edwards, and "the office located at 4621 Jamestown Avenue." On April 26, 1997, Judge Walter also authorized the execution of search warrants on the home and office of Cecil Brown and the law office of Cecil Brown's attorney, Ken Pitre. Items authorized to be seized in the Edwards' warrants included business records, bank records, computer data, records of real estate transactions, phone records, and currency or legal tender. While conducting the search of Stephen Edwards' residence, FBI agents discovered a free standing safe. Within the safe, they found a key to a safe deposit box located at Regions Bank. On April 29, 1997, Judge Parker signed a search authorizing the search of this safe deposit box. During the search of Edwin Edwards' residence, FBI *419 agents discovered a "Maximum Security Corporation" free standing safe. Within this safe was a key to a safe deposit box located at City National Bank. On April 29, 1997, Judge Parker issued a warrant authorizing the search of that safe deposit box.

Stephen Edwards and Edwin Edwards have filed a motion to suppress all fruits of the aforementioned search warrants on the following grounds: (1) the affidavits in support of the applications contained falsities regarding the reliability of the confidential informant; (2) the affidavit in support of the warrant to search Stephen Edwards' residence did not establish probable cause because there was an insufficient nexus between the residence and the items sought; (3) because the warrant for the search of Stephen Edwards' residence lacked probable cause, the items seized in the safe deposit box at Regions Bank should also be suppressed as fruits of the poisonous tree; (4) the affidavit in support of the warrant for the search of Stephen Edwards' office did not establish probable cause because the location was not adequately particularized and because there was an insufficient nexus between the office and the items sought; (5) there was no

probable cause to search Edwin Edwards' residence because there was no nexus between the residence and the evidence sought; (6) because the warrant for the search of Edwin Edwards' residence lacked probable cause, the items seized in the safe deposit box at City National Bank should be suppressed as fruits of the poisonous tree; and (7) the office of Edwin Edwards was not described with sufficient particularity in the search warrant.

Legal Standards--Search of a Residence and Office

The Court has already set forth the standards for probable cause earlier in this opinion. That discussion will not be repeated here. The Court will discuss additional factors which are required for the search of a person's residence or office.

[13] In United States v. Freeman, [FN125] the Fifth Circuit set forth standards to determine when the search of a person's residence is constitutional under the Fourth Amendment. The mere fact that there is probable cause to believe that a person committed a crime does not in and of itself constitute probable cause to search his residence or office for evidence of that crime. [FN126] The Freeman court stated that a nexus must also exist between the residence and the items sought in the search warrant. The Fifth Circuit stated:

FN125. 685 F.2d 942 (5th Cir.1982).

FN126. Id. at 949.

We have consistently held that facts must exist in the affidavit which establish a nexus between the house to be searched and the evidence sought... However, that nexus may be established either through direct observation or through normal inferences as to where the articles sought would be located... In [United States v. Maestas], we explained:

The affidavit need not contain information providing certainty that the objects sought will be found as a result of the search. It is only necessary that "the facts and circumstances described in the affidavit would warrant a man of reasonable caution to believe that the articles sought are located" at the place where it was proposed to search. [FN127]

FN127. Freeman, 685 F.2d at 949 (citations omitted).

The nexus requirement to search a home applies equally to the search of a person's office.

The defendants contend that since the court in Freeman refused to uphold the warrant, Freeman requires a similar result in this case. The defendants' contention is without merit. It is true that Freeman requires that the affidavit establish a nexus between the house or office to be *420 searched and the evidence sought. "That nexus may be established, however, by direct observation or through normal inferences as to where the articles sought would be located." [FN128] While the evidence provided in the affidavit in Freeman connecting the defendant's activities to his home was too tenuous to support a finding of probable cause, that case does not prohibit all searches of homes or offices. In fact, in Freeman, the court concluded that "there was probable cause to search for passports, personal identification papers and bank and safety deposit box records because these were 'precisely the sorts of items which people tend to keep at home among their personal papers and effects.' " [FN129] In United States v. Maestas, [FN130] the Fifth Circuit found that the fact that the defendant's accomplice sent materials to the defendant's home as part of a counterfeiting scheme combined with the reasonable inference that people keep mail at the house supported probable cause to search the defendant's home for mail connected with the scheme. "The affidavit must connect (in a manner more convincing than in Freeman) the residence to be searched with the illegal activity, but this nexus may be established 'through normal inferences as to where the articles sought would be

located.' " [FN131] "Probable cause involves a practical, commonsense determination by a neutral judicial officer whether the information provided represents a basis for believing crime has been committed." [FN132] "The justification for allowing a search of a person's residence when that person is suspected of criminal activity is the common-sense realization that one tends to conceal fruits and instrumentalities of a crime in a place to which easy access may be had and in which privacy is nevertheless maintained." [FN133] The Green court further noted that in "normal situations, few places are more convenient than one's residence for use in planning criminal activities and hiding fruits of a crime." [FN134] While this notation "does not provide carte blanche for searching a home when one is suspected of illegal activity," [FN135] concealment of the type of records sought in the search warrants in this case from the defendants' residences and offices certainly can be reasonably inferred from the facts set forth in the affidavits filed with Judges Parker and Walter. Each case involving the validity of a search requires a determination of whether probable cause exists to authorize the search which is fact intensive and depends on the facts and circumstances of the particular case.

FN128. United States v. Broussard, 80 F.3d 1025, 1034 (5th Cir.1996).

FN129. United States v. Pace, 955 F.2d 270, 277 (5th Cir.1992) (quoting Freeman, 685 F.2d at 949).

FN130. 546 F.2d 1177 (5th Cir.1977).

FN131. Pace, 955 F.2d at 277 (internal citations omitted); See also United States v. Minis, 666 F.2d 134 (5th Cir.), cert. denied, 456 U.S. 946, 102 S.Ct. 2013, 72 L.Ed.2d 469 (1982).

FN132. Pace, 955 F.2d at 277.

FN133. United States v. Green, 634 F.2d 222, 226 (5th Cir.1981).

FN134. Id.

FN135. United States v. Pace, 955 F.2d 270, 277 (5th Cir.1992).

[14] In this case, probable cause was clearly established in the affidavits submitted to the authorizing judges. The affidavits describe a sufficient connection between the illegal activity and the expectation of what would be found at the residences and offices to give rise to probable cause to search the homes and offices in question. Furthermore, there was a reasonable inference which could be drawn from the facts set forth in the affidavits which supported Judges Parker and Walter's determination of probable cause to search the residences and offices. An important fact exists in this case that was not involved in Freeman. In this case, *421 there was a continuing criminal activity that was ongoing up to the time the warrants were executed. The nature of the criminal activity alleged in this case and set forth in the affidavits was sufficient for Judges Parker and Walter to conclude that the records sought would be found at the residences and offices of Edwin Edwards, Stephen Edwards and Cecil Brown. The affidavit prepared by Agent Santini [FN136] contained numerous references to conversations obtained as a result of wiretaps which had been previously authorized by Judges Parker and Walter. These conversations which are set forth in detail in the affidavit refer to schemes involving the Jena Project, [FN137] the Treasure Chest Casino, [FN138] the Players Riverboat Casino, [FN139] the 15th Riverboat License, [FN140] New Orleans Riverboat Corporation, [FN141] Evergreen Global Resources, [FN142] and Cascade Insurance. [FN143] The details of these conversations and the other facts included in these affidavits set forth sufficient information to establish a reasonable inference that criminal activity was occurring at the residences and offices of Stephen

Edwards, Edwin Edwards and Cecil Brown. There was also sufficient information to conclude the documents sought in the search warrants would be found at those places.

FN136. Defense Exhibit 9.

FN137. Santini affidavit, p. 7.

FN138. Santini affidavit, p. 55.

FN139. Santini affidavit, p. 64.

FN140. Santini affidavit, p. 83.

FN141. Santini affidavit, p. 112.

FN142. Santini affidavit, p. 129.

FN143. Santini affidavit, p. 158.

In United States v. Gann, [FN144] the Ninth Circuit held that a number of factors should be considered to determine whether there is a sufficient nexus between the place to be searched and the evidence sought. The court stated that the required nexus "rests not only on direct observation, but on the type of crime, the nature of missing items, the extent of the suspects' opportunity for concealment, and normal inferences as to where a criminal would be likely to hide stolen property." [FN145] In the present case, based upon the ongoing criminal activity allegedly occurring on the part of Stephen Edwards, Edwin Edwards, Cecil Brown and other co-conspirators, the government believed that numerous business records, as well as U.S. currency, were generated and were continuing to be generated at their residences and offices. It is logical to infer that the types of items sought--business records, bank account statements, phone records and currency--would be stored at Stephen Edwards' and Edwin Edwards' offices or residences located in Baton Rouge,

the same city in which the alleged criminal activity occurred. The same can be said for Cecil Brown's residence and office located in Eunice.

FN144. 732 F.2d 714 (9th Cir.), cert. denied, 469 U.S. 1034, 105 S.Ct. 505, 83 L.Ed.2d 397 (1984).

FN145. Id. at 722.

The defendants' contention that there were false statements in Agent Santini's supporting affidavit was discussed in some detail earlier in this opinion. The defendants argue that the government denied the judges issuing the June 26, 1996 orders the opportunity to fully consider the facts presented to them because the government failed to fully inform the court of the CW's unreliability and dishonesty. [FN146] In doing so, defendants again rely on comments made after the orders were issued by an Assistant United States Attorney in a bankruptcy case regarding the credibility of the CW. The defendants contrast this with a statement in the affidavit submitted in support of the application for the order which states that during the CW's period *422 of cooperation "he has never been known to provide false or misleading information." [FN147] Moreover, defendants argue that although the statement came after the initial application, the statements made to the bankruptcy judge are indicative of a posture adopted the government sometime before the application was made. These contentions are without merit for the reasons previously set forth herein.

FN146. See Rec. Doc. No. 440 at 57-61.

FN147. See Rec. Doc. No. 440 (Exh. 5b at 9).

"[A]n informant's 'veracity,' 'reliability' and 'basis of knowledge' are all highly relevant...." [FN148] However, this Court finds that the issuing judges were given ample information to raise the issue of the CW's credibility at the time they made their decisions

to issue the search warrants. The affidavits submitted to the courts clearly indicate that the CW had been indicted by a grand jury only three months earlier and was also "the target of [an ongoing] federal tax and corruption investigation...." [FN149] No further discussion is required on this issue.

FN148. See Illinois v. Gates, 462 U.S. 213, 230, 103 S.Ct. 2317, 2328, 76 L.Ed.2d 527 (1983).

FN149. See Rec. Doc. No. 440 (Exh. 5b at 9) ("A review of the various records pertaining to the CW reveals that on March 20, 1996, a District Court Grand Jury in Harris County, Texas indicted the CW for one (1) count of Money Laundering and one (1) count of Theft by Sting. This matter is pending and is scheduled for trial on July 29, 1996. The CW is also the target of a federal tax and corruption investigation in the Houston, Texas area, currently being handled by the FBI and IRS in conjunction with the United States Attorney's Office.")

Search of Stephen Edwards' Residence

Stephen Edwards also argues that the statements regarding "the five thing" is the only alleged fact supporting probable cause to search his home. First, Stephen Edwards contends that there is no basis to conclude that "the five thing" refers to money. Second, even if it does refer to money, Stephen Edwards argues that this statement standing alone is insufficient to establish probable cause. Regardless of whether "the five thing" was in fact cash, the defendant's argument is misplaced. It is improper to consider this conversation in a vacuum. This conversation is one factor in support of probable cause to believe that at least some of the money allegedly received by Stephen Edwards as a result of a number of extortion and bribery schemes being investigated was being stored at his residence.

In United States v. Pofahl, [FN150] the Fifth Circuit found that the search warrant issued in that case "was supported by specific,

concrete facts" rather than an assumption standing alone. [FN151] In the present case, the conversation involving "the five thing" is a "specific, concrete fact" linking Stephen Edwards' residence to fruits and instrumentalities of the alleged criminal activity, which serves to strengthen the required nexus.

FN150. 990 F.2d 1456 (5th Cir.1993).

FN151. Id. at 1475. See also United States v. Broussard, 80 F.3d 1025 (5th Cir.1996) (specific facts linking defendant and the residence to the items sought).

In United States v. Maestas, the Fifth Circuit was careful to note that "firsthand evidence in the affidavit" that the materials subject to seizure are on the premises to be searched "is not always necessary." [FN152] The court further stated that "evidence that a defendant has stolen material which one normally would expect him to hide at his residence will support a search of his residence." [FN153] The Fifth Circuit then described the appropriate standard to be applied to the issuing judge's determination of probable cause:

FN152. 546 F.2d 1177, 1180 (5th Cir.1977).

FN153. Id. (citations omitted).

The affidavit need not contain information providing certainty that the objects sought will be found as a result of the search. It is only necessary that "the facts and circumstances described in the *423 affidavit would warrant a man of reasonable caution to believe that the articles sought were located" at the place where it was proposed to search. It is axiomatic that an affidavit for [a] search warrant is to be interpreted in a common sense and realistic manner, and the magistrate's finding of probable cause should be sustained in doubtful or marginal cases. [FN154]

FN154. Id. (citations omitted) (emphasis provided). This Court is aware that the decision in Maestas was rendered prior to the Supreme Court's decision in Illinois v. Gates. However, the reasoning in Maestas was not altered by Gates.

As previously stated, much of the alleged criminal activity in the present case occurred in Baton Rouge, the same city in which Stephen Edwards resides. The nature of the alleged criminal activity (extortion and bribery), the fruits produced (currency and documents), and the "understanding" on the part of Edwin Edwards that Stephen Edwards stored "the five thing" at his home all support a finding of probable cause to believe that fruits of the alleged criminal activity would be found at the residence of Stephen Edwards. The link between the items sought and the residence sought to be searched is more than an inference. The conversation between Edwin and Stephen Edwards referencing "the five thing" provides a direct link between Stephen Edwards' home and the alleged conspiracy involving extortion and bribery. [FN155]

FN155. The Court notes the decision in United States v. Humphrey, 104 F.3d 65 (5th Cir.), cert. denied, 520 U.S. 1235, 117 S.Ct. 1833, 137 L.Ed.2d 1038 (1997), wherein an "all records" search was upheld. Four factors were cited in support of the decision: (1) the fraud was pervasive; (2) there was considerable overlap of the Humphreys' business and personal lives; (3) the residence was the primary place of business; and (4) the defendants maintained no known bank accounts. Defendant attempts to factually distinguish the present case, asserting that Stephen Edwards' residence was not his primary place of business. While that is true, the warrant in the present case did not involve a generic, "all records search." The Fifth Circuit pointed out that "the Fourth Amendment requires much closer scrutiny of an all records search of a residence." Id. at 69.

[15] Stephen Edwards also raises the issue of staleness of the aforementioned conversation between himself and Edwin

Edwards. The referenced conversation took place on March 9, 1997, and the search warrant was issued by Judge Parker on April 26, 1997. In United States v. Robins, the Fifth Circuit held that staleness of the underlying information must be decided on the particular facts of each case, and a "mechanical count of days is of little assistance" in the determination. [FN156] "Fairly long periods of time are allowed to elapse between information and a search warrant in cases where the evidence clearly shows ... a longstanding, on-going pattern of criminal activity." [FN157] A similar conclusion was reached in United States v. Cherna. [FN158] Given the allegations of longstanding, ongoing criminal activity cited in Agent Santini's supporting affidavit, the Court finds the defendant's staleness argument is without merit.

FN156. 978 F.2d 881, 892 (5th Cir.1992) (citing United States v. Hyde, 574 F.2d 856, 865 (5th Cir.1978)).

FN157. Id. at 892 (emphasis provided).

FN158. 184 F.3d 403 (5th Cir.1999), cert. denied, 529 U.S. 1065, 120 S.Ct. 1669, 146 L.Ed.2d 479 (2000) (when information shows a longstanding, ongoing pattern of criminal activity, the information need not be regarded as stale even if fairly long periods of time have elapsed between the information and the issuance of the warrant) (citing United States v. Webster, 734 F.2d 1048, 1056 (5th Cir.1984)).

This Court concludes that it was reasonable for Judge Parker to conclude that there was probable cause to believe that the items sought would be found at the home of Stephen Edwards. Agent Santini's affidavit alleges conspiracies involving extortion and bribery which were ongoing at the time the search warrant was issued. Stephen Edwards' residence was located in *424 the same city where the alleged criminal activity was occurring. The phone call from Edwin Edwards at his home to Stephen Edwards at his home in which he asked Stephen to "bring the five thing" to the office the next day because he needed to "pass it on to

someone" is significant. Based upon Stephen Edwards' affirmative response, it was a reasonable, common-sense conclusion for Judge Parker to draw that Stephen Edwards was concealing at least some of the fruits of the alleged extortion and bribery at his home. It is of no moment to argue that "the five thing" was no longer at the residence, assuming Stephen followed through with Edwin Edwards' request to bring "the five thing" to the office. What remains is the logical inference that Stephen Edwards concealed items at his home related to the alleged criminal activities. Edwin Edwards did not ask that Stephen first retrieve "the five thing" from the office, or whether Stephen had "the five thing" at his home. Implicit in Edwin Edwards' request was his knowledge that Stephen was storing the cash at his home. Giving "great deference" to the issuing judge's determination of probable cause, and considering the totality of circumstances presented to Judge Parker, this Court concludes that the search warrant issued as to Stephen Edwards' residence was valid. [FN159]

FN159. See also United States v. Robins, 978 F.2d 881, 892 (5th Cir.1992) (the detective's "experience and common sense" supported the conclusion that "a residence is a quite convenient, commonly-used place for planning continuing criminal activities like large-sale marijuana trafficking and money laundering conspiracies").

Additionally, Agent Santini states in his supporting affidavit that he has been a Special Agent for twenty-two years and has been investigating violations involving criminal offenses associated with white collar crime and public corruption for over eighteen years. [FN160] Agent Santini has extensive experience investigating the types of crime alleged in the present case, and his belief that the items sought would be located at Stephen Edwards' residence is not unreasonable.

FN160. Rec. Doc. No. 448, Exh. 7, Attachment D.

Having found that the search of Stephen Edwards' home was supported by probable cause, the Court concludes that seizure of the key to the safe deposit box was valid under the plain view doctrine. Safe deposit box number 5069 was issued to Leslie L. Edwards, with Stephen R. Edwards appointed deputy. Consequently, the subsequent warrant authorizing search of the safe deposit box at Regions Bank was also valid. Indeed, counsel for Stephen Edwards correctly conceded during oral argument that if in fact the initial search of Stephen's home was valid, there would be no grounds to challenge the seizure of the key and the subsequent search of the safe deposit box. [FN161]

FN161. See transcript of oral argument held on November 17, 1999.

Search of Edwin Edwards' Residence

Edwin Edwards asserts two bases for invalidating the warrant authorizing the search of his residence: (1) Agent Santini's supporting affidavit contains false statements; and (2) there was no probable cause to search his home because the facts set forth in Agent Santini's affidavit failed to establish the required nexus. The issue of false statements in the affidavit has been extensively addressed by the Court and found to be without merit.

The Court has also extensively addressed the jurisprudence regarding the sufficiency of the nexus between the residence and items
sought in the search warrant earlier in this opinion. In the affidavit in support of the warrant to search Edwin Edwards' residence, Agent Santini enumerated numerous consensual recordings, excerpts from Title III interceptions, and physical surveillance activities related to the alleged criminal activities of Edwin Edwards. As previously noted, the totality *425 of the circumstances must be considered in determining whether there was probable cause that the items sought would be found at Edwin Edwards' residence. Incidents should not be considered

in isolation irrespective of the surrounding facts.

At the time of the application for the search warrant, FBI agents had been conducting Title III surveillance for approximately four and one-half months. [FN162] Based upon the Title III interceptions, as well as physical surveillance of Edwin Edwards, Agent Santini referenced conversations and activities which formed probable cause to believe that: (a) Edwin Edwards was engaging in ongoing criminal activity, specifically conspiracies involving bribery and extortion; (b) the activities in furtherance of these alleged crimes occurred both at the office at 4621 Jamestown Avenue and at Edwin Edwards' home; and (c) evidence generated from the alleged criminal activities was being held at Edwin Edwards' home.

FN162. The initial Title III interceptions were authorized on December 6, 1996. The search warrant relative to Edwin Edwards' home was issued on April 26, 1997.

Agent Santini's 188-page affidavit in support of the application to search the home of Edwin Edwards enumerates intercepted conversations, consensually recorded conversations, and results of physical surveillance which occurred during the months preceding the application. Agent Santini's affidavit is replete with documentation of calls placed to or from Edwin Edwards' home. On numerous occasions Edwards telephonically "conducted business" on the alleged schemes from his residence. [FN163] Specifically, Agent Santini asserts in his affidavit that Edwin Edwards conducted business at his home related to the alleged criminal activity which he believed was occurring regarding the Cascade Scheme in December of 1996.

FN163. Application and Affidavit for Search Warrant; Santini affidavit.

Additionally, the affidavit contains a specific factual link between the fruits or instrumentalities of the alleged criminal

activity and the residence of Edwin Edwards. As stated by Agent Santini, FBI agents provided Pat Graham with $100,000.00 of government money. In accordance with the undercover plan of operation, the money was segregated into two bundles--one of $25,000.00 for Cecil Brown, and one of $75,000.00 for Edwin Edwards. Thereafter, Pat Graham, Cecil Brown and Edwin Edwards and his wife had dinner at Ruth's Chris Steak House, during which the Jena Project was discussed. [FN164] During this discussion, Cecil Brown stated to Edwin Edwards that "I will have your receipt made for the 75 head of cattle tonight." Agent Santini believed this was a reference to the $75,000.00 which was intended for Edwards. As they were leaving the restaurant, Edwards stated to Graham that they had to "go outside and sign those things." Agent Santini believed that this was Edwin Edwards' instruction to retrieve the money from Cecil Brown's car. Graham then gave the $100,000.00 to Cecil Brown. Physical surveillance revealed that Cecil Brown then traveled to Edwin Edwards' home and stayed there for approximately one hour. These statements set forth by Agent Santini in his affidavit provide specific factual support for the likelihood that fruits of the alleged criminal activity would be
found at Edwin Edwards' residence.

FN164. The Jena Project involved the planning and building of a private juvenile facility in Jena, Louisiana.

The affidavit also noted that Edwin Edwards sometimes placed or received telephone calls at his residence, as evidenced by a court-authorized pen register, in furtherance of the alleged conspiracies involving extortion and bribery. At times Edwin Edwards met with persons at his residence, as evidenced by physical surveillance and statements of the confidential witness, again in furtherance of the alleged criminal activity. These factors, in *426 conjunction with the assertion that one of the extortion pay-offs was brought to Edwin Edwards' residence, support the finding of probable cause to issue the warrant to search Edwin Edwards' residence. According due deference to

the initial determination of probable cause, and applying a "totality of the circumstances" standard, this Court finds that it was not arbitrary for Judge Parker to find that the facts and circumstances described in the affidavit would "warrant a man of reasonable caution to believe that the articles sought" would be located at Edwin Edwards' residence. [FN165]

FN165. United States v. Freeman, 685 F.2d 942, 949 (5th Cir.1982).

Defendants argue that there is no proof that the money allegedly brought to Edwin Edwards' home was still there at the time the search warrant was issued. This argument is unpersuasive. Even if the cash was removed to Edwin Edwards' home, the removal of the cash does not destroy probable cause. The fact that the money was brought to Edwin Edwards' home by Cecil Brown indicates that at times, fruits of the alleged crimes were kept at that location. Because of the Court's finding that the search of Edwin Edwards' residence was lawful, the argument that the safe deposit box key was illegally seized also fails. Safe deposit box number 2378 was "issued to Sam Robie, with appointed deputies being Edwin W. Edwards and Stephen R. Edwards." [FN166] Consequently, the key was lawfully seized, and the subsequent warrant to search the safe deposit box at City National Bank was also valid.

FN166. Application and Affidavit for Search Warrant for Safe Deposit Box Number 2378, Exhibit 4, Attachment "A".

Search of "The Office Located at 4621 Jamestown Avenue"

Both Edwin Edwards and Stephen Edwards argue that the warrant authorizing the search of the 4621 Jamestown Avenue office is void for lack of particularity in the description of the location in violation of the Fourth Amendment.

The issue before the Court is "not whether the description is technically accurate in every detail, but rather whether the description is sufficient to enable the executing officer to locate and identify the premises with reasonable effort, and whether there is any reasonable probability that another premises might be mistakenly searched which is not the one intended to be searched under the warrant." [FN167]

FN167. United States v. Prout, 526 F.2d 380, 387-88 (5th Cir.), cert. denied, 429 U.S. 840, 97 S.Ct. 114, 50 L.Ed.2d 109 (1976) (citing United States v. Darensbourg, 520 F.2d 985, 987 (5th Cir.1975)). See also United States v. Melancon, 462 F.2d 82, 94 (5th Cir.1972), United States v. Sklaroff, 323 F.Supp. 296, 321 (S.D.Fla.1971).

The initial brief description on the first page of the search warrant is as follows: "The Office Located at 4621 Jamestown Avenue, Baton Rouge, Louisiana." [FN168] Attachment "A" to the search warrant contains the following description of the location to be searched:

FN168. Application for Search Warrant for "The Office Located at 4621 Jamestown Avenue, Baton Rouge, Louisiana."

The law office of EDWIN W. EDWARDS and STEPHEN R. EDWARDS is located at 4621 Jamestown Avenue, Baton Rouge, Louisiana, which is described as a one-story, white brick building. At the main entrance are double glass doors which have the following names listed: The left side glass door is listed LIEUX ENTERPRISES; The right side glass door is listed as EDWIN W. EDWARDS, STEPHEN R. EDWARDS, Attorneys at Law and JOHN M. WAITZ, Attorney at Law. EDWIN W. EDWARDS has his personal office located at the right front corner of the building, that is, the office just past and adjacent to STEPHEN R. EDWARDS' office. Entering the front door of the *427 law office and turning right at the reception desk, the first office on the right as one proceeded down the hall is the personal

office of STEPHEN R. EDWARDS. The next office on the right down the hall is the personal office of EDWIN W. EDWARDS. Continuing down the hall and to the left and adjacent to EDWIN W. EDWARDS' office is MARION EDWARDS' office. Further down the hall and the second office on the right is the office of WANDA EDWARDS. [FN169]

FN169. Application for Search Warrant for "The Office Located at 4621 Jamestown Avenue, Baton Rouge, Louisiana," Attachment "A".

Edwin Edwards, Stephen Edwards, Marion Edwards and Wanda Edwards had previously been designated as interceptees in the Title III authorizations issued by Judge Parker. Although Fred Lieux and John Waitz occupied personal offices in the building at 4621 Jamestown Avenue, there is no indication in the more particularized description set forth in Attachment "A" that their personal offices were to be included in the search. The descriptions in the search warrant sufficiently limited the scope of the search to the personal offices of Edwin Edwards, Stephen Edwards, Marion Edwards and Wanda Edwards. It was reasonable to include within the scope of the search those "common areas" to which all occupants at 4621 Jamestown Avenue had access.

The Court finds that the place to be searched is described with sufficient particularity in the warrant. Based upon the general description and the more specific description in Attachment "A" attached to the search warrant, it is apparent that the agents intended to search the particular offices of Stephen Edwards, Edwin Edwards, Marion Edwards, and Wanda Edwards within the building at 4621 Jamestown Avenue. Given the description of each of the specific offices, it is reasonable to conclude that there was no intent to search the offices of any other persons in the building. This particularized description serves the purpose of preventing "general" searches by limiting the search to the specific areas designated. Further, it was reasonable that the

search of those offices would encompass a search of the common areas in the building to which all occupants at 4621 Jamestown Avenue had access, including the kitchen and library/conference room. A diagram of the office at 4621 Jamestown Avenue had previously been submitted to Judge Parker on December 6, 1996 when he authorized Title III interceptions at that location. Judge Parker was clearly familiar with the ongoing investigation and this building because of his prior Title III authorizations. Likewise, Agent Santini was familiar with the layout of the building because of these previous applications and his ongoing involvement in the investigation of Edwin Edwards and Stephen Edwards. [FN170]

FN170. See United States v. Bonner, 808 F.2d 864 (1st Cir.1986), cert. denied, 481 U.S. 1006, 107 S.Ct. 1632, 95 L.Ed.2d 205 (1987) (failure to include address was a minor, technical omission that was not fatal to the warrant; the agents had previously conducted surveillance of the premises, knew precisely which house was to be searched, and described it accurately and in detail).

The Court notes that an error in the description of the location is not necessarily fatal to the search warrant. [FN171] United States v. Judd [FN172] involved the search of two offices in the same building complex, but with two separate doors and two separate addresses. Only one address was listed, but both offices were searched. The Fifth Circuit upheld the search, noting that the defendants' complaint regarding lack of particularity of description was "contrary to well-established law concerning the specificity required in warrants." [FN173]

FN171. United States v. Judd, 889 F.2d 1410 (5th Cir.1989) (citations omitted).

FN172. Id.

FN173. Id. at 1413.

*428 In the present case, the location of the premises to be searched was sufficiently particularized in the search warrant. The general description, which bears the street address, must be read in conjunction with the more specific description which sets forth the particular personal offices to be searched.

Edwin Edwards and Stephen Edwards also argue that the search warrant is invalid because there was not a sufficient nexus between the items sought in the search warrant and the Jamestown office. [FN174] As noted earlier in this opinion, Agent Santini submitted a 188-page affidavit in support of the application which included numerous excerpts from consensual recordings, Title III interceptions, and physical surveillance. Many of the activities alleged to have occurred in furtherance of the conspiracies involving extortion and bribery transpired at the Jamestown office. Agent Santini references numerous meetings between Edwin Edwards and/or Stephen Edwards and others, and numerous phone calls in which the alleged schemes were discussed in the offices. There are a number of references to the exchange of money involving Stephen Edwards and Edwin Edwards at the Jamestown office. There are many references to "contracts" and other business records allegedly confected to support the ongoing criminal activities and payment of money. There is also information in the affidavit indicating that cash and business records generated from the activities were stored at the Jamestown office.

FN174. As used herein, the "Jamestown office" refers to the office located at 4621 Jamestown Avenue, including the specific description in Attachment "A".

Given the extensive information provided by Agent Santini in his supporting affidavit, the Court finds that it was entirely reasonable for Judge Parker to conclude that a sufficient nexus existed between the items sought and the Jamestown location, thereby supporting his determination that probable cause existed to issue the warrant.

The Search of Cecil Brown's Residence

Cecil Brown also challenges the search of his home and office and the search of his attorney's office. He asserts the same basic arguments previously disposed of. The Court adopts its previous findings herein and concludes that based on the totality of the information submitted to Judge Walter, there was:
(1) probable cause to issue the warrants;
(2) a sufficient nexus between the criminal activity and the items sought to support the search of Cecil Brown's home and office and the office of his attorney.

Conclusion

For reasons set forth herein, [FN175] the following motions are denied: (1) Motion of Defendant Cecil Brown to Suppress Fruits of Search Warrants (Rec.Doc. No. 450); (2) Motions of Defendants Edwin Edwards, Stephen Edwards, Cecil Brown, Andrew Martin, Bobby Johnson, Gregory Tarver and Ecotry Fuller to Suppress Fruits of Wire, Oral and Electronic Surveillance (Rec.Doc. No. 440); (3) Stephen Edwards' Motion to Suppress Evidence (Rec. Doc. No 445); (4) Defendant Stephen Edwards' Motion to Suppress Fruits of Search Warrants (Rec.Doc. No. 447); (5) Motion to Defendant Edwin Edwards to Suppress Fruits of Search Warrants (Rec.Doc. No. 452); (6) Motion of Defendant Edwin Edwards to Suppress Fruits of Search Warrants (Rec.Doc. No. 469); (7) Motion by Edwin Edwards, Stephen Edwards, Cecil Brown, Andrew Martin, Bobby Johnson, Gregory Tarver and Ecotry Fuller for Reconsideration of Denial of Various Motions to Suppress, Denial of a *429 Franks Hearing and for Stay of Introduction of Evidence (Rec.Doc. No. 1004); and (8) Supplemental Motion of Edwin Edwards, Stephen Edwards, Cecil Brown, Andrew Martin, Bobby Johnson, Gregory Tarver and Ecotry Fuller for Reconsideration of Denial of Various Motions to Suppress, Denial of Franks Hearing and for Stay of Introduction of Evidence (Rec.Doc. No. 1245).

FN175. The Court has considered all of the arguments and contentions of the parties whether discussed herein or not.

124 F.Supp.2d 387

REVISED AUGUST 22, 2002

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-30771

UNITED STATES OF AMERICA

Plaintiff-Appellee,

versus

CECIL BROWN,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana, New Orleans Division

July 15, 2002

Before KING, Chief Judge, JONES and DENNIS, Circuit Judges.

EDITH H. JONES, Circuit Judge:

Cecil Brown was convicted of extorting money for himself and former Governor Edwin Edwards from businesses seeking to obtain state contracts and licenses in Louisiana. Brown argues on appeal that (1) he was entitled to an evidentiary hearing on his motion to suppress evidence obtained through electronic surveillance because the Government used a false or misleading affidavit to procure the initial wiretap order; and (2) the superseding indictment should have been dismissed because

the Government, in violation of the Fifth Amendment's Due Process Clause, engaged in a vindictive prosecution. Having reviewed the record, we hold that the district court did not err in denying Brown's motion to suppress evidence or his motion to dismiss the indictment. The judgment of conviction is AFFIRMED.

I. INTRODUCTION

The jury found that, from 1992 to 1997, Cecil Brown acted as a "front man" for Governor Edwin Edwards in a scheme to extort money from companies that needed to obtain state approval to conduct business in Louisiana. Brown would meet with businessmen and offer to use his influence with the governor to obtain favorable treatment for their business ventures. The illegal payoffs, which Brown and Edwards would split, typically were disguised as consulting fees paid to Brown's company, Louisiana Consultants.

The indictment focused on four commercial ventures: the Coushatta Indian Tribe's request to operate a casino, a bid on a municipal waste contract, an unsuccessful attempt to bring a professional basketball team to New Orleans, and a plan for a privately funded and operated juvenile detention facility in Jena, Louisiana. The Jena prison project involved a Texas company, Viewpoint Development Corporation, whose president was Fred Hofheinz, the forme. mayor of Houston, Texas.[1] Viewpoint's principal negotiator with Louisiana officials was Patrick Graham, who began cooperating with the FBI after he was indicted on unrelated criminal charges in early 1996.

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[1] Hofheinz pled guilty in November 2000 to misprision of extortion and was a witness for the Government at Cecil Brown's trial.

The jury convicted Cecil Brown on seven counts of extortion, wire fraud, and interstate travel fraud, in violation of 18 U.S.C. §§ 1962, 1951, 1343, and 2314. Brown was acquitted, though, on one count of racketeering and one count of interstate travel fraud. He was sentenced to 51 months' imprisonment, to be served consecutively to the 66-month sentence imposed in a related extortion case involving riverboat casino licenses. See United States v. Edwin Edwards, et al., No. CR-98-165-B-M2 (M.D. La.). Cecil Brown raises two issues on appeal. First, Brown contends that the Government's case against him rests on an unlawfully obtained wiretap application. He contends that the Assistant United States Attorney who requested the initial wiretap order misled the district court as to (1) the trustworthiness of Patrick Graham, the Government's cooperating witness, and (2) the content of consensually-taped conversations between Graham and Brown. Brown thus asserts that the evidence obtained via the wiretap should have been suppressed and, at a minimum, he was entitled to an evidentiary hearing on his motion to suppress evidence.

Second, Brown contends that the Government vindictively added the racketeering count and additional allegations of illegal conduct after the district court granted Brown's motion to dismiss the original indictment because of a Speedy Trial Act violation. Brown argues that the Government's decision to increase the number and severity of charges denied him due process of law and, consequently, that the superseding indictment should have been dismissed.

The district court considered Brown's arguments and denied his motions to suppress the evidence obtained from the wiretap and to dismiss the superseding indictment. Finding no error, we affirm the judgment.

II. THE WIRETAP ORDER

A. The Franks Standard

Cecil Brown contends that the FBI agent's affidavit supporting the Government's application for a wiretap order was insufficient to establish probable cause. According to Brown, the affidavit contained "a series of misrepresentations and material omissions" designed to give a false impression of both the reliability of the Government's confidential informant and the quantum of evidence the Government already had gathered. Brown argues that the district court erred in denying his request for an evidentiary hearing pursuant to Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), and also in failing to suppress the evidence gathered through electronic surveillance.

With respect to Franks hearings, we have held that a defendant is entitled to an evidentiary hearing on a motion to suppress evidence if he shows that (1) allegations in a supporting affidavit were deliberate falsehoods or made with a reckless disregard for the truth, and (2) the remaining portion of the affidavit is not sufficient to support a finding of probable cause. United States v. Dickey, 102 F.3d 157, 161-62 (5th Cir. 1996)(citing Franks, 438 U.S. at 171, 98 S.Ct. at 2684); see also United States v. Guerra-Marez, 928 F.2d 665, 671 (5th Cir. 1991). The second prong of the test, however, is often determinative: "Even if the defendant makes a showing of deliberate falsity or reckless disregard for the truth by law enforcement officers, he is not entitled to a hearing if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause." Dickey 102 F.3d at 161-62; United States v. Privette, 947 F.2d 1259, 1261 (5th Cir. 1991).

The district court concluded that Brown was not entitled to a Franks hearing and denied Brown's motion to suppress evidence gathered through electronic surveillance. The wiretap order at issue here led to three separate prosecutions, and the defendants in each case raised nearly identical motions to suppress. District Judge Frank Polozola set out at length his reasons for denying the motion in the riverboat license extortion case, in which Cecil Brown was a codefendant. See United States v. Edwin Edwards, et al., 124 F.Supp.2d 387, 393-400 (M.D. La. 2000). Then, in a case involving criminal tax violations by an Edwards associate, District Judge Carl Barbier independently reviewed the record and adopted Judge Polozola's findings when denying Martin's motion to suppress. See United States v. Andrew Martin, 169 F.Supp.2d 558, 566-67 (E.D. La. 2001) (criminal tax violations). And in this case, then-District Judge Edith Brown Clement reviewed the materials and adopted Judge Polozola's findings as her own.

This court reviews the denial of a Franks hearing de novo. Dickey, 102 F.3d at 62.

Brown's allegations of false or misleading statements may be grouped under two headings. First, he says that the Government relied heavily on a cooperating witness, Patrick Graham, whom the Government knew was completely untrustworthy. Second, Brown contends that the Government misrepresented what was actually said during consensually recorded conversations between Graham and Brown.

B. Patrick Graham's Reliability

The Government's application for a wiretap order was supported by the affidavit of FBI agent Freddy Cleveland. Agent Cleveland stated that the facts and circumstances showing probable cause were developed through a "cooperating witness" (or "CW"), who was later identified as Patrick Graham. In his affidavit, which was dated June 26, 1996, Agent Cleveland

began his discussion with the following statement:

> The CW has provided information to Special Agents of the FBI since April 30, 1996. Since his cooperation with the FBI, he has never been known to provide false or misleading information. The CW has made numerous consensual telephone and body recordings with CECIL BROWN, which have verified portions of the information set forth in this affidavit. A review of the various records pertaining to the CW reveals that on March 20, 1996, a District Court Grand Jury in Harris County, Texas indicted the CW for one (1) count of Money Laundering and one (1) count of Theft by Sting. This matter is pending and is scheduled for trial on July 29, 1996. The CW is also the target of a federal tax and corruption investigation in the Houston, Texas area, currently being handled by the FBI and the IRS in conjunction with the United States Attorney's Office.

In spite of the agent's disclosure of the pending criminal charges and investigation, and the Government's corroboration of much of what Graham had told them, Brown contends that the Government deliberately misled the district judge (Judge Donald Walter) as to Patrick Graham's trustworthiness.

Brown argues that the Government did not believe that Graham was even minimally trustworthy. Brown's primary argument on this point is based on a statement made in different court proceedings by the same Assistant U.S. Attorney who had applied for the wiretap order. In a bankruptcy proceeding in Texas in September 1996 -- which involved Patrick Graham's brother's wife -- the AUSA told the court that "the Grahams" are not credible: "[T]he things that we're not able to independently corroborate, we believe are lies. And that's the way it has to be

when you deal with the Grahams." As Brown admits, the AUSA made this statement nearly three months after he had obtained the wiretap order. Even if we assume that the later statement accurately reflects the Government's view of Patrick Graham's credibility as of June 1996, we do not believe that Agent Cleveland's affidavit falsely implied that Patrick Graham was trustworthy. As noted above, the affidavit recites the various charges brought against Graham (although Brown complains that the "sterile recitation" of pending charges did not adequately reveal the extent of Graham's criminal nature). And immediately after stating that Graham had not been known to provide false or misleading information, Agent Cleveland emphasized that the FBI had made "numerous consensual telephone and body recordings" that corroborated significant aspects of Graham's story.

In sum, the affidavit provided to Judge Walter contains enough information with respect to Graham's reliability for the judge to make a proper ruling on the question of probable cause. Brown has failed to show that the allegations in Agent Cleveland's supporting affidavit were made "with a reckless disregard for the truth" and for the purpose of bolstering Patrick Graham's credibility. Brown thus does not meet the standard set forth in the first prong of the Franks test.

Moreover, even if we assume arguendo that Patrick Graham could not be trusted, and we set to one side all the allegations that are not independently corroborated, the affidavit still contains enough evidence to establish probable cause to believe that a crime was being committed.

Patrick Graham's narrative, reduced to its essentials, may be summarized as follows: In mid-1992, Graham and several of his business partners began lobbying for the right to develop a juvenile detention center in Jena, Louisiana. To secure political support for the project, Graham arranged a meeting with Cecil Brown, a friend of Governor Edwards. After several false starts,

Graham thought he had obtained financing for the Jena project. Graham asserted that Governor Edwards agreed to pressure Richard Stalder, the director of the Louisiana Department of Corrections, to enter into a "cooperative endeavor agreement" with Graham. In return, Graham agreed to pay Edwards and Brown $2.5 million. Graham claims that he made a $245,000 cash payment in 1994. Then, Graham and Brown (in FBI Agent Cleveland's words) signed "a contract for services, dated December 1, 1994, to account for [$600,000 in cash] given to BROWN. A copy of the contract has been provided to FBI agents by the CW." FBI agents also obtained a copy of the agreements between Graham and the Louisiana Department of Corrections. The date when the state officials approved the project corresponds to Graham's account of when Edwards was lobbying on his behalf.

In late 1995, Graham and his partners agreed to sell their interest in the Jena prison project to a Houston attorney (Douglas Bech) for $4.8 million, including $1.3 million owed to unnamed "creditors". Graham asserts that the $1.3 million represented the remainder of the money owed to Brown and Edwards. Graham expected that the sale would be finalized in the summer of 1996. FBI agents obtained a copy of Viewpoint Development's contract with Bech and confirmed the numbers Graham had given them.

By early 1996, Graham had been indicted for two criminal offenses and was under investigation by the FBI. Graham began cooperating with the FBI on April 30, 1996, and with Graham's consent, the FBI began taping telephone and in-person conversations between Graham and Brown.

During the May 8th conversation, Brown and Graham talked about the remaining money that Graham's partners owed. Graham and Brown tried to negotiate the exact amount. Graham said, "Now what I have given you all so far totals up to by the time you figure the tax, you know, it was cash. By the time you

figure the tax, it's like a million dollars. So you offset. That leaves a balance of 1.5." Brown responded, "All right." A little later in that conversation, Brown said that unless he received $1.7 million during the closing, they would have "problems." The parties failed to reach a definite agreement, but Brown suggested that Graham "put to paper everything that was paid to date."

From May 9 to May 13, 1996, FBI agents recorded (again with Graham's consent) three telephone conversations, the essence of which was that Graham and Brown would meet in person to "go over the figures." On May 29, Graham and Brown met at a crawfish boil at Brown's house. At the FBI's direction, Graham prepared a memo regarding the two payments -- $245,000 and $600,000 in cash -- already made to Brown. The FBI also recorded the conversation, which included references to the memo. Brown suggested that he would talk to "our friend" (whom the Government believes was Edwin Edwards), and a court-authorized "pen register" revealed a telephone call from Brown's residence to Edwards's residence on May 30th.

On June 7, FBI agents again recorded a telephone conversation between Brown and Graham. Brown said that he had discussed the specific numbers with their "friend" the day after the crawfish boil. Brown then demanded more money and suggested that the Department of Corrections might hold up the Jena project. Graham and Brown agreed to meet again. At this point, the Government prepared to request a wiretap for the telephones in Brown's house and business.

Having reviewed the information contained in the affidavit, we will focus on the allegations that are either undisputed or corroborated. It is undisputed that Graham and his partners were seeking state approval to proceed with the Jena prison project. The memorandum that Graham prepared and Brown tacitly approved indicated that Graham had already made two payments totaling $845,000 to Cecil Brown in December

1994. (Graham and Brown later suggested that these cash payments were equivalent to more than $1 million before taxes.) Shortly after the $600,000 payment was made, state officials entered into a cooperative endeavor agreement with Graham and his partners. More than a year later, when Venture Development was selling its interest in the project, the purchase price included a $1.3 million payment for unnamed creditors. On the recorded conversations, Graham and Brown emphasized that they wanted to keep "Edwin" or "our friend" happy because he still had the ability to put the project on hold. Graham and Brown also discussed the money that had been paid thus far and how much more was owed. Brown told Graham that he had to consult with "him," and a pen register indicated that a call was placed from Brown's residence to Edwards's residence the following day. Brown then suggested that the Jena project would be in trouble if Graham and his partners could not pay more money.

To be sure, there are many allegations in the affidavit that are not independently confirmed. Graham told the FBI that he had met with Edwin Edwards several times personally, that Edwards had set the $2.5 million price, and that he saw Brown leave the $245,000 and $600,000 cash payments in Edwards's office in the Governor's Mansion. These allegations are reported in FBI Agent Cleveland's affidavit, but they are not corroborated. Even if we assume that Graham cannot be believed, and we exclude all allegations that are not corroborated, the affidavit still contains sufficient information to establish probable cause to believe that crime had been committed or was being committed. In our view, the recorded conversations independently corroborate the salient aspects of Patrick Graham's story.[2]

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[2] Brown also asserts, with little elaboration, that the district court could not adequately assess Patrick Graham's reliability because the Government failed to disclose "the many benefits" Graham would receive from his cooperation. The Government had agreed, for example, not to use any of the

C. The Recorded Conversations

In a similar vein, Brown contends that FBI Agent Cleveland's interpretation of the taped conversations was made with reckless disregard for the truth. Specifically, Brown argue that the Government assumed that Graham and Brown were referring to Edwin Edwards even when they did not call him by name. Brown contends that the Government used "very selective excerpts" from the recorded conversations to suggest that Edwards (and not Brown) was receiving most of the money. Thus, in Brown's view, if the Government had provided an accurate rendition of the recorded conversations (that is, one that did not rely on Graham's background information), a district judge likely would have interpreted the recorded conversations as a discussion of a legitimate consulting arrangement instead of a scheme to extort money. Brown's argument is without merit.

The best way to address this issue is to recount in greater detail the recorded conversations. The first conversation takes place on May 8, 1996, as Patrick Graham and Cecil Brown are driving through Louisiana. Brown says that he needs money and wants assurances that he will receive half of the agreed-upon price ($2.5 million plus another $1 million for a related deal) when Graham and his partners sell their interest in the Jena prison project. Graham tries to assure Brown that the deal will be closed soon. Graham then emphasizes "one thing":

> PG: I want EDWIN to be comfortable, okay? I can't afford anything to go wrong on this deal. All right?

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volunteered information against Graham and to inform the sentencing judges in the other cases about Graham's assistance. Brown's argument is without merit. Not only are these benefits unremarkable, but the consensually recorded conversations corroborated Graham's story.

So, we've got to get him, whatever that portion is covered first. . . . I'm not gonna drag you out more than 90 days on yours. Okay?

CB: Yeah.

PG: I just don't . . . ah, you know, you never have told me what the . . . the . . . the sharing ratio is.

CB: He doesn't get any. I get it all. I want half right away.

PG: Okay. Hey, say whatever you want to . . . .

CB: Uh huh.

PG: . . . but I mean [don't?] be cavalier about this CECIL.

CB: Okay.

PG: But if . . .

CB: Nothing's gonna go wrong with this deal. I just want half of my money right away to cover some obligations I have.

PG: I understand. I understand.

CB: Okay.

PG: And I need to get your obligations. I need to be assured. . . . 14

CB: And then I want. . . .

PG: . . . that your obligations are covered.

CB: Right.

PG: That's what I want.

CB: And then I want a little bit. . . . I want a little bit of my other half. . .

PG: I understand.

CB: . . . also at closing. And I'm not talking about much there.

Before proceeding further, we should emphasize that (as Brown correctly points out) Agent Cleveland's affidavit omitted Brown's statement that Edwards "doesn't get any" of the money. It would have been preferable, of course, to bring this fact to Judge Walter's attention. However, we agree with Judge Polozola's conclusion that Brown's denial of Edwin Edwards's "'take' of the proceeds of this transaction in one particular excerpt does not negate the additional information in the record regarding potential criminal payoffs." Edwards, 124 F.Supp.2d at 400. In fact, the context of this excerpt suggests that Brown's denial cannot be taken at face value: After stating that he gets "all" the money, Brown immediately says that all of the first payment will go to cover "obligations." Graham, who had just said he wanted to be sure that Edwin Edwards got his portion, then rephrased his concern: "I need to be assured . . . that your obligations are covered." The more plausible reading of this particular passage is that Edwards would be receiving -- through Cecil Brown -- most, if not all, of the initial payment of $1.7 million. This interpretation is made even stronger by remarks made later in that same conversation.

Brown and Graham then make their first attempt to clarify how much money was owed. Brown tells Graham that eventually they need to "put a pencil to paper." Patrick Graham's position was that the total money owed was $3.5 million; that he had already paid the equivalent of $1 million to $1.2 million in cash; that $1.7 million would be paid to Brown when the deal in Texas went through; and that Graham's partners in Texas wanted him to renegotiate the remaining money owed. Brown's primary concern, however, was getting the $1.7 million as soon as possible.

PG: I know you're always broke and I need to know your . . . your share

. . . but what I need to know is what is it that we have to come [up] with to satisfy our friend to make sure that . . . the worst that can happen CECIL, is a project go bad even after you get funded and everybody gets . . . we can't be cavalier and say . . .

CB: Unh-unh. Unh-unh.

PG: This is great. He's out of office. There's . . . there's no risk anymore. I'm telling you. . . .

CB: If . . . if I don't get 1.7 at closing . . . if . . . if my company, LOUISIANA CONSULTANTS, doesn't get 1.7 at closing. . .

PG: Um hum.

CB: . . . ah

PG: Then we've got a problem.

CB: We've got problems, okay.

There can be little doubt that "our friend" in this context means Edwin Edwards. Not only was Edwards the sole topic of conversation up that point, but the reference to being "out of office" reinforces the point: Edwards's term as governor had ended in January 1996, four months before this conversation. Patrick Graham repeated this point moments later: "I know he's out of office now [. . .], but we don't want anything to go wrong."

In addition to the unmistakable references to Edwards, this passage is also important because it confirms that the $1.7 million would be paid to Louisiana Consultants. As noted above, Cecil Brown was doing business as Louisiana Consultants, so that any payment to the company was essentially a payment to Brown personally.

The conversation then returns to Brown's need for money at closing. Brown says, "if I were you,"

> CB: I would be prepared at closing to pay me 1.7, and . . . and I . . . and I need a few dollars. I need a . . .
>
> PG: Okay. So what you're saying is, the 1.7 is not gonna satisfy you. We need something over that to get you happy.
>
> CB: Please.

Graham warns Brown not to take any of the $1.7 million payment for his own use. According to Graham, the other partners in Viewpoint Development needed to be reassured that the payment at closing would not go directly to Brown. In the end, Graham agrees to deliver some money in addition to the $1.7 million at closing on one condition:

> PG: [. . .] as long as we can make the agreement CECIL that you're not gonna take from his ah, and create a problem for this thing. I will . . . I will go back and tell my partners that, okay, we need to come up with half of it to cover ah, all our obligations so that ah, ah . . . let me tell you. He's got the ultimate hammer. CECIL, he's got the ultimate hammer. All he's got to do is make phone calls and stop the legislature . . .
>
> CB: Huh. Huh.
>
> PG: . . . from funding this thing, and that's Texas all over. That's the problems I had in Texas. You don't need it and I don't need it. I

mean, you'll have everybody investigating everything. (Pause)

CB: I need 1.7 at closing for LOUISIANA CONSULTANTS. And can you let me have ah . . .

PG: What?

CB: A couple of hundred thousand?

PG: Okay.

It is clear that the $1.7 million is earmarked for someone other than Cecil Brown and that this unnamed person has the power to squelch the Jena prison project by pressuring state legislators.

Just a few seconds later, Brown confirms his understanding of the new arrangement.

CB: The 1.7 I believe, we . . . we do that at closing. That's cut and dry. Am I correct?

PG: Okay. And . . . and that you can't touch. That's not yours. That goes to obligations. We've got to come up with another hundred thousand to . . . to make . . . that you can keep to take care of what you get.

CB: [. . .] Hell yeah. I can do that.

Patrick Graham again warns Brown not to keep the $1.7 million. Graham then says that his partners are afraid that Brown will keep some of the money. But, Graham tells Brown, "you and I know different. Ah, ah, you know, we talked about it before. I think the bastard rapes and pillages you, but that's, you know, that's your relationship. I don't get into it."

Brown became rather angry at this point. Raising his voice, he says

CB: [. . .] At closing make sure that I have ah, 1.7 paid to LOUISIANA CONSULTANTS plus a hundred thousand dollars to get me out of a crack.

PG: Okay.

CB: And then after that every 30 days ah, it . . . it don't have to be a hundred thousand dollars every 30 days. I just want to make sure that I get my money.

PG: Please assure me CECIL that you're not gonna step on that and keep it. It just concerns the shit out of me.

CB: Don't let it. I know what I'm doing. You think I would . . . I would take a chance at queering this deal where it is now? How long have we waited? How long have we worked?

PG: Now CECIL, I'm telling you. I'm . . . I'm telling you. I just want him happy. Okay? I want your assurance that you'll do what it takes to get him happy. Okay?

After a short pause, Graham asked Brown if he had briefed "him" on the status of the project. Brown replies that "he" knows about the details, and Graham immediately changes the subject and asks if "he" had fun in Colorado. The two men then talk briefly about Governor and Mrs. Edwards's recent ski trip to Colorado.

Graham then returned to the topic of how much money had already been paid. Graham reminded Brown that he had already delivered "two large bundles of . . . of green money." The

"before tax equivalent" of the cash payments, Graham explained, was anywhere from $1 million to $1.2 million, "depending on how you do your tax math." When the $1.7 million due at closing was factored in, that left a balance of $600,000 to $800,000. Brown and Graham quibbled for a while over how much had been paid and how to calculate the balance. Graham demanded, "Give me credit for what I've already paid." Brown said he wanted to know the exact balance: "That's the number I need to know."

> CB: Because I want to know what I'm getting.
> PG: I understand, because that remains with you. I am appreciative of that and I'm sensitive to it.
> CB: And if you need some of that . . .
> PG: I want you . . .
> CB: . . . some of that that's coming to me, that's fine, because you got me here in the first place.
> PG: No. No.
> CB: But do not flirt with that other motherf***er. Do not.

Brown reiterated that he needed to know "the second number" (i.e., the $600,000 to $800,000 balance) soon, and that he did not want to negotiate that number downward.

Graham then told Brown to "let me know how your discussions go tomorrow." It is not obvious who Brown was scheduled to meet with, but Graham warned Brown, "Don' t piss him off." Brown called Graham back on May 9th to say that he "had a discussion with him . . . . [and] got some directions what I need to do. . . . I'm directin' to get ah all of my money." The two men agreed to sit down and talk more about the balance owed.

At a May 29th crawfish boil, Graham wrote on a sheet of notebook paper what he and his partners were proposing. Graham calculated that they had already paid in cash the equivalent of $1.2 million. Graham wrote that they would pay the "1.7 due at closing, plus $100,000." Because a side deal had fallen through, Graham and his partners were not willing to pay the full $3.5 million they had previously agreed upon. Brown was not pleased with this offer, but Graham insisted that he "sit down with the man and go over it and I want you to come back and tell me, PAT, that's okay, or no, we gotta negotiate some more."

About a week later, Graham called Brown and said, "I know you didn't have time to uh, uh, to discuss anything with our friend about those numbers." Brown said that he had spoken to him "the very next day" after the crawfish boil. (As noted above, a court-ordered pen register indicated that a call had been placed from Brown's residence to Edwards's residence the evening after the party.) Brown accused Graham of "trying to pay me a hundred thousand when I feel you owe me a million."

Graham said that he understood that Brown was not happy about receiving only $100,000, but he emphasized,

PG: I just want uh, uh, certain parties, we need our friend to be happy on the front side, that's all, um, my goal is. I could make you happy.
CB: I'm sure he's happy.
PG: Okay.
CB: You know he ought to be.
PG: I understand. (Laughter)
CB: I'm not happy.

Brown said that he had "ask[ed] him to do something about it."

CB: Have you not gotten a call yet?

PG: No.
CB: Okay, you will.
PG: Alright, is he gonna call me?
CB: No, uh, probably Stalder [the secretary of the Louisiana Department of Corrections].

There is no indication whether Graham received a telephone call, but the import of this threat is clear: The Louisiana Department of Corrections could delay the Jena prison project; and if Graham and his partners wanted their sale to proceed as planned, they should consider increasing the money paid directly to Brown.

In their final conversation before the Government's decision to seek a wiretap order, Brown and Graham again failed to reach an agreement. Graham says, "We're gonna make him happy. Okay?" Brown counters that "He, ah my lawyer says I'm stupid" for trusting Graham and his partners. Graham became angry:

PG: I wish you'd throw right back at that son of a bitch that he's gone to the bank hundreds of thousands of [. . .] dollars on me.
CB: I'm worried about Cecil. I ain't worried about him.
PG: Okay.
CB: Oh, he's gone to the bank a million times[. . . .] But that don't help me.

Graham tries to assure Brown that they can work something out to get him more money up front. But in the end, Graham returns to his main theme:

PG: [A]ll I want is I don't want it to blow up and all I want to do is

keep him happy because you and I we can get him happy, then you and I can make some money in the long run. Okay?

CB: Have you, ah, ah, my lawyer has met with ah I'm surprised you didn't get a call yet. But maybe you will or maybe he tried and maybe they talked again.

Graham ended this conversation, as he often did, by telling Brown not to worry and to trust him.

Having reviewed these recorded conversations, we conclude that the Government reasonably believed that the $1.7 million paid by Viewpoint Development was going to Edwin Edwards and that Edwards (at Brown's request) was willing to use his influence to increase the share paid directly to Brown. In other words, when FBI Agent Cleveland deduced that "our friend" and "him" referred to Edwin Edwards, those allegations were not made with reckless disregard for the truth. We agree with the three district judges who have considered this issue before and hold that the allegations in the affidavit, which accurately summarized the recorded conversations, support a finding of probable cause. Therefore, Cecil Brown was not entitled to a Franks hearing on his motion to suppress the evidence.

III. VINDICTIVE PROSECUTION

The second issue on appeal is whether the district court erred in not dismissing the superseding indictment on the grounds that the Government was engaged in a vindictive prosecution in violation of the Fifth Amendment's Due Process Clause. As noted above, Brown contends that the Government vindictively added a racketeering count and an additional allegation of illegal conduct after the district court granted

Brown's motion to dismiss the original indictment because of a Speedy Trial Act violation.

Addressing this issue requires a more detailed review of the procedural history of the case. A grand jury for the Middle District of Louisiana returned the original indictment against Cecil Brown in November 1999. A year later, for reasons not germane to this appeal, the Fifth Circuit reassigned the case to the Eastern District of Louisiana. The district court, with the approval of both parties, continued the trial until February 2001 in order to allow defense counsel additional time for preparation.

In December 2000, Cecil Brown moved to dismiss the original indictment, citing violations of the Speedy Trial Act. The district court conducted a conference by telephone on December 20, 2000. According to Brown's attorney, the Assistant U.S. Attorney threatened that if Brown prevailed on the Speedy Trial Act motion, the government would seek a new indictment.

In January 2001, the district court granted Brown's motion to dismiss the original indictment. United States v. Brown, 2001 WL 13337 (E.D. La.). As he had indicated before, the AUSA quickly obtained a new indictment that included allegations of extortion involving the Coushatta Indian Tribe as well as a new count for violation of the Racketeer Influenced and Corrupt Organizations Act (RICO) and a notice of forfeiture under RICO.

Shortly before the case went to trial in March 2001, Cecil Brown moved to dismiss the superseding indictment on the grounds that the Government's decision to bring additional charges amounted to prosecutorial vindictiveness in violation of Brown's rights guaranteed by the Due Process Clause of the Fifth Amendment. See Blackledge v. Perry, 417 U.S. 21, 25-27, 94 S.Ct. 2098, 2101-02, 40 L.Ed.2d 628 (1974). The district court denied Brown's motion to dismiss the superseding indictment.

We review the district court's factual findings concerning prosecutorial vindictiveness for clear error and its legal determinations de novo. United States v. Johnson, 91 F.3d 695, 698 (5th Cir. 1996).

"If the defendant challenges as vindictive a prosecutorial decision to increase the number or severity of charges following a successful appeal, the court must examine the prosecutor's actions in the context of the entire proceedings." United States v. Krezdorn, 718 F.2d 1360, 1364 (5th Cir. 1983) (en banc). And, as Judge DeMoss succinctly put it, "if there is any indication that the prosecutor had a legitimate reason . . . for increasing the charges, then no presumption of vindictiveness is created." United States v. Aggarwal, 17 F.3d 737, 744 (5th Cir. 1994)(citing Krezdorn, 718 F.2d at 1364).

The context of the entire proceedings includes the timing of the prosecutor's decision. Johnson, 91 F.3d at 698. While the general standard articulated in Krezdorn makes no distinction between pre-trial and post-trial decisions, the Supreme Court has observed that "a change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than is a pretrial decision." United States v. Goodwin, 457 U.S. 368, 381-82, 102 S.Ct. 2485, 2492-93, 73 L.Ed.2d 74 (1982). Many of our cases, including Krezdorn, have involved new indictments following a successful appeal by defendants. The reason is apparent: By the time a case has been tried, the Government has discovered and assessed all the relevant information and has reached a decision about the extent to which the defendant should be prosecuted. A pre-trial change in the indictment (e.g., following the rejection of a plea agreement) is less likely to be deemed vindictive: "In the course of preparing a case for trial, the prosecutor may uncover additional information that suggests a basis for further prosecution or he simply may come to realize that information possessed by the State has a broader significance." Goodwin, 457 U.S. at 381-82, 102 S.Ct. at 2492-93.

Krezdorn suggests that we employ a burden-shifting framework for evaluating prosecutorial vindictiveness claims. "Absent a presumption of vindictiveness . . . , the defendant must prove that the prosecutor's conduct was actually vindictive." Johnson, 91 F.3d at 698.

Applying these principles, the district court found no indication that the prosecutor was acting vindictively.

First, as the district court pointed out, one should not read too much into the fact that 13 months passed between the time of the original indictment and the time when the RICO charge and Coushatta allegations were added. The court found that the Government originally indicted Cecil Brown to avoid potential problems with the statute of limitations and that the Government allowed the case to lie dormant until it had first tried the related cases involving Governor Edwards and Insurance Commissioner Jim Brown. When viewed in the light of these facts, "the apparent dilatoriness in the change of the original charge evaporates." The fact that the indictment could have been amended earlier to include a RICO count and allegations of fraud involving the Coushatta Indian Tribe's casino deal is not probative.

Second, the district court found that the Government had already decided to seek a new indictment before Brown moved to dismiss on Speedy Trial Act grounds. The AUSA filed a statement explaining why he thought there was a potential defect in the travel fraud counts in the original indictment. Moreover, the Government wanted to seek a forfeiture and to bring in evidence of the Coushatta Tribe casino deal. The Government believed that the RICO count would address these problems, and the district court accepted this explanation as true. The prosecutor's explanation is further supported by the fact that the Government had filed a motion to admit (under Fed. R. Evid. 404(b)) evidence of the allegations involving the Coushatta Tribe before Brown filed his motion to dismiss for Speedy Trial Act

violations.

Third, the district court reasoned that Brown's assertion of his rights under the Speedy Trial Act was not consequential enough to provoke a vindictive response. The district court informed the parties that, if she found a violation of the Speedy Trial Act, she would dismiss the indictment without prejudice because of the unusual circumstances of the case. As the dismissal was without prejudice, and the prosecutors could not have been inconvenienced by Brown's motion (which was pending for less than a month), the district court thought it "extremely unlikely that the prosecutor would feel the need to 'punish a pesky defendant for exercising his legal rights'" (citing Goodwin, 457 U.S. at 384, 102 S.Ct. at 2494).

Finally, the district court rejected Brown's argument that the AUSA's statements during the telephone conference constitute direct proof of actual vindictiveness. During this conference, the AUSA indicated that he would seek additional charges if the motion to dismiss the original indictment were granted. And, of course, when the original indictment was dismissed, the Government carried through on its promise. However, in her order denying the motion to dismiss, the district court emphasized that she was on the line during the discussions and that "the Court did not perceive the prosecutor's statements as a threat." The district court found that "the prosecutor was merely giving Brown fair warning that, if forced to reindict, he would cure perceived deficiencies in the original indictment that he might not have been allowed to correct had trial proceeded as scheduled."

Brown has failed to show why the district court's factual findings in this matter are clearly erroneous. Brown insists that the AUSA explicitly tied his decision to seek a harsher indictment to Brown's assertion of his rights under the Speedy Trial Act. Also, Brown argues that the AUSA knew about the Coushatta transactions as early as July 1996, and there was no

reason for not including them in the indictment. Even if we accept Brown's assertion on this point, it is not disputed that the Government had planned to introduce the Coushatta allegations at trial and that the Government had filed a Rule 404(b) motion before Brown filed his motion to dismiss.

In sum, the district court did not err in concluding that no presumption of vindictiveness arises in this case. The Government's decision to add the new charges and allegations was motivated a non-vindictive purpose, namely, to strengthen the Government's case.

IV. CONCLUSION

For the foregoing reasons, the judgment is AFFIRMED.

KING, Chief Judge, specially concurring:

With one small exception, I concur fully in Judge Jones's excellent opinion for the panel. The exception relates to whether the Government effectively misrepresented Patrick Graham's credibility to the district judge when the agent said, in his affidavit, that "[s]ince his cooperation with the FBI, he has never been known to provide false or misleading information." The agent provided information (about pending indictments and a pending federal tax and corruption investigation of Graham) to the district judge that would put the judge on notice that Graham was potentially untrustworthy. Nevertheless, on the basis of Brown's offer of proof, the district judge may not have been fully advised (as he should have been) of what may have been the Government's well-founded conviction that Graham was, in fact, untrustworthy. But, as Judge Jones has clearly established, even if we assume arguendo that the Government was not truthful or sufficiently forthcoming on the matter of Graham's lack of trustworthiness and we set aside all the allegations that are not independently corroborated, the affidavit still contains enough evidence to establish probable cause to believe that a crime was being committed.

DENNIS, Circuit Judge, concurring in the judgment and in Parts I, III, and IV of the court's opinion, and specially concurring in Part II:

In my judgment, Brown satisfied the first prong of the Franks v. Delaware[3] test by showing that information was omitted from the warrant affidavit with intentional or reckless disregard for the truth. I concur in the judgment of the court, however. When the material that was intentionally or recklessly omitted is added, and Patrick Graham's uncorroborated statements are set aside, there remains sufficient content in the

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[3] 438 U.S. 154 (1978).

reconstructed affidavit to support a finding of probable cause for belief that Brown had committed, was committing, or was about to commit violations of the Hobbs Act. Consequently, Brown was not entitled to a Franks hearing.

In Franks, the Supreme Court held "that, where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request."[4] In summarizing its opinion, the Court repeated its holding with "some embellishment":

> There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant. Finally, if these

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[4] Id. at 155-56.

> requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing. Whether he will prevail at that hearing is, of course, another issue.[5]

In this circuit, "[o]missions or misrepresentations can constitute improper government behavior."[6] "By reporting less than the total story, an affiant can manipulate the inferences a magistrate will draw. To allow a magistrate to be misled in such a manner could denude the probable cause requirement of all real meaning."[7] We therefore apply Franks to instances of omission.[8] To warrant a Franks hearing, the exclusion of the information must reflect intentional or reckless misconduct by the affiant, and the omitted facts must be material.[9] "Clear proof of deliberate or reckless omission is not required. . . . At this stage, all that is required is that the defendant make a substantial showing that the affiant intentionally or recklessly omitted facts required to

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[5] Id. at 171-72.

[6] United States v. Tomblin, 46 F.3d 1369, 1377 (5th Cir. 1995) (citing United States v. Stanert, 762 F.2d 775, 781 (9th Cir. 1985)).

[7] Stanert, 762 F.2d at 781.

[8] United States v. Bankston, 182 F.3d 296, 305 (5th Cir. 1999), rev'd in part on other grounds, Cleveland v. United States, 531 U.S. 12 (2000).

[9] See Tomblin, 46 F.3d at 1377.

prevent technically true statements in the affidavit from being misleading."[10]

Furthermore, we have agreed with and adopted the holding of several other circuits "that a deliberate or reckless misstatement or omission by a governmental official who is not the affiant may nevertheless form the basis of a Franks claim."[11] Indeed, the Supreme Court noted in Franks that "police [can]not insulate one officer's deliberate misstatements merely by relaying it through an officer-affiant personally ignorant of its falsity."[12] Accordingly, a defendant is entitled to a Franks hearing upon making a substantial preliminary showing that a governmental official deliberately or recklessly caused facts that preclude a finding of probable cause to be omitted from a warrant affidavit, even if the governmental official at fault is not the affiant.

In challenging the presumption of validity afforded the affidavit supporting the wiretap order, Brown alleged, in his motion to suppress, that the affidavit of FBI Special Agent

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[10] Stanert, 762 F.2d at 781. See Franks, 438 U.S. at 171.

[11] Hart v. O'Brien, 127 F.3d 424, 448 (5th Cir. 1997) (citing United States v. Wapnick, 60 F.3d 948, 956 (2d Cir. 1995); United States v. DeLeon, 979 F.2d 761, 764 (9th Cir. 1992) ("A deliberate or reckless omission by a government official who is not the affiant can be the basis for a Franks suppression. The Fourth Amendment places restrictions and qualifications on the actions of the government generally, not merely on affiants."); United States v. Calisto, 838 F.2d 711, 714 (3d Cir. 1988); United States v. Pritchard, 745 F.2d 1112, 1118 (7th Cir. 1984)), abrogated on other grounds by Kalina v. Fletcher, 522 U.S. 118 (1997).

[12] Franks, 438 U.S. at 164 n.6.

Freddy N. Cleveland was "materially misleading." In particular, Brown contended that the government intentionally misled Judge Walter as to the trustworthiness of its cooperating witness, Patrick Graham, and misrepresented the content of the consensually recorded conversations between Graham and Brown. In support of those allegations, Brown submitted to the district court an offer of proof consisting of ten volumes of exhibits. The exhibits included: (1) a transcript of testimony given by former Assistant United States Attorney ("AUSA") Steven J. Irwin before a federal bankruptcy court in Houston, Texas, on September 16, 1996;[13] (2) transcripts of deposition testimony given by Irwin and James B. Letten in November 2000;[14] (3) various news articles recounting Graham's criminal

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[13] Irwin appeared before the bankruptcy court in support of the government's ex parte motion to stay proceedings in a case that involved Michael Graham's wife. Michael Graham, who reached a deal with the government at the same time as his brother Patrick, was scheduled to testify in that case. In requesting the stay, the government apparently argued that the bankruptcy proceedings (and Michael Graham's testimony therein) could jeopardize its undercover operations in Louisiana.

[14] Letten, who was the First Assistant United States Attorney at the time of his deposition, is currently the Acting United States Attorney for the Eastern District of Louisiana. Letten and Irwin were deposed on different dates in November 2000 by a defendant in a federal criminal case entitled United States v. James Anthum Collins and Yank Barry, No. 98-18 (S.D. Tex.). The defendants in that case were the former Executive Director of the Texas Department of Criminal Justice (Collins) and the president of VitaPro Foods, Inc. (Barry). VitaPro sold a high-protein soy product that was used as a meat substitute in penal institutions. The government alleged that Barry paid Collins at least $20,000 to gain approval for a five-year multimillion-dollar contract with the Department of

history; and (4) the full transcripts of the consensually recorded conversations.

In his June 26, 1996 affidavit, Cleveland indicated that his cooperating witness was credible: "[Patrick Graham] has provided information to Special Agents of the FBI since April 30, 1996. Since his cooperation with the FBI, he has never been known to provide false or misleading information."[15] Brown's offer of proof demonstrates, however, that the government knew, as early as April 1996, that Graham was thoroughly dishonest and had a reputation in Texas for engaging in fraudulent and deceptive practices. The offer of proof also indicates that the affidavit purposefully understated the seriousness of the criminal matters that were pending against Graham in Texas and the magnitude of Graham's incentive to provide false information about Brown and Edwin Edwards in order to curry favor with federal prosecutors in both Louisiana and Texas. Thus, Cleveland's affidavit reported "less than the total story" to Judge Walter.[16] By omitting information concerning Graham's character and vouching for his trustworthiness, the government created a false impression of Graham's reliability, which likely misled the issuing judge.

In his November 2000 deposition, Irwin, the AUSA who applied for the wiretap order, was asked whether he was aware, in April 1996, that Patrick and Michael Graham were swindlers

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Criminal Justice. Patrick Graham, who solicited business for VitaPro in Louisiana, informed the federal government that the Texas VitaPro deal was a bribe scheme and served as the government's key witness at trial.

[15] Def.'s Mot. Suppress Ex. 5-B, Cleveland Aff. ¶ 15.

[16] United States v. Stanert, 762 F.2d 775, 781 (9th Cir. 1985).

and "con men" who lacked credibility. Irwin responded, "We knew what we were buying when we bought into them."[17] He explained that the Grahams initially approached him through their attorney Charles Blau.[18] After preliminary discussions with Blau, Irwin ran a Lexis/Nexis search and "reams and reams and reams of material came out about Patrick Graham and Michael Graham and the various schemes that they were involved in."[19] The search certainly would have uncovered the widely reported details of Patrick Graham's January 1996 arrest for accepting a $150,000 down payment on a $750,000 total fee for arranging the escape of a convicted wife-murderer from a maximum-security prison in Texas.[20] Irwin concluded, from the "reams of material" available to the government, that if the Grahams said, "'It's raining outside,' somebody better go outside

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[17] Def.'s Mot. Suppress Ex. 27 at 42.

[18] Blau approached Irwin at a gambling corruption seminar held at the Grand Hotel in Gulfport, Mississippi, on April 19-20, 1996. Irwin was a panelist at the seminar.

[19] Def.'s Mot. Suppress Ex. 27 at 14.

[20] Newspaper articles reporting the January 4, 1996 arrest were available in the Lexis/Nexis database shortly thereafter. See, e.g., Christy Hoppe, Prison Developer Accused of Seeking Money to Help Dallas Killer Escape, DALLAS MORNING NEWS, Jan. 6, 1996, at 1A, available at LEXIS, News, Dallas Morning News File (load date: Jan. 8, 1996). Although Irwin confirmed in his deposition that he knew about the foiled jailbreak plan in April 1996, the wiretap application did not provide Judge Walter with the details of this disturbing crime. Rather, the government advised only that Graham had been indicted by the Grand Jury in Harris County, Texas, for one count of money laundering and one count of theft by sting.

and come back wet."[21]

As his deposition makes clear, Irwin reached this conclusion on the Grahams' trustworthiness prior to April 30, 1996, the date that Patrick Graham began cooperating with the government. Irwin's September 1996 testimony before the bankruptcy court is fully consistent with this early-held opinion of Graham's bad character: "I'm not defending the Grahams as good people; they're not. . . . They're as bad as they come. . . . [T]he things that we're not able to independently corroborate, we believe are lies. And that's the way it has to be when you deal with the Grahams."[22] In sum, Irwin's testimony at his deposition and in the bankruptcy-court establishes that, beginning shortly after his first knowledge of Patrick Graham, Irwin and other federal officials continuously viewed Graham as an unreliable person whose information was worthless in the absence of independent corroboration.

Soon after becoming an informant, Graham proved that the government's distrust of him was justified. In his deposition, Letten characterized the government's deal with the Grahams, which was never reduced to writing, as an "informal cooperation

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[21] Def.'s Mot. Suppress Ex. 27 at 47. Shortly after the Grahams began cooperating with federal authorities in Louisiana, AUSAs for the Southern District of Texas warned Irwin to "[b]e careful, because you're reaching into a bad box of snakes." Id. at 41.

[22] Def.'s Mot. Suppress Ex. 2, 9/16/96 Hr'g Tr. at 30. Although the bankruptcy-court testimony was given nearly three months after the issuance of the wiretap order, Irwin's November 2000 deposition establishes that the testimony concerning the Grahams' credibility was not based on fresh information but reflected, instead, conclusions that Irwin reached during his April 1996 background research on the Grahams.

agreement with use/derivative use immunity" covering only offenses committed in Louisiana.[23] The Grahams, however, wanted multistate transactional immunity, and, even though they did not receive it, they represented to others that they had.[24] In a May 23, 1996 letter to Charles Blau, AUSA Peter G. Strasser complained that the Grahams had recently told attorney Dan Cogdell, who was representing Patrick Graham in the Texas jailbreak prosecution, that they had "'immunity for (their) actions in Louisiana and Texas,'" a representation that was, in Strasser's words, "simply wrong."[25] Thus, less than one month after Patrick Graham began cooperating, he was already misrepresenting his "deal" in an effort to broaden the scope of the immunity conferred on him by the government.[26]

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[23] Def.'s Mot. Suppress Ex. 28 at 85. Use immunity-also termed use/derivative-use immunity-is "[i]mmunity from the use of the compelled testimony (or any information derived from that testimony) in a future prosecution against the witness." BLACK'S LAW DICTIONARY 754 (7th ed. 1999).

[24] Transactional immunity is "[i]mmunity from prosecution for any event or transaction described in the compelled testimony. This is the broadest form of immunity." BLACK'S LAW DICTIONARY 754 (7th ed. 1999).

[25] AUSA Strasser was Irwin's immediate supervisor and had participated in the initial meetings with Blau and the Grahams. The letter appears in Brown's offer of proof as an exhibit to the November 2000 deposition of James B. Letten. See Def.'s Mot. Suppress Ex. 29, Def.'s Ex. 106.

[26] In his November 2000 deposition, Irwin acknowledged the government's initial concern that the Grahams would later mischaracterize the deal: "[D]id I think the Grahams for one minute would come back , try to-to say the deal was something other than what it was? Absolutely." Def.'s Mot. Suppress Ex. 27 at 43.

By virtue of his role in the investigation, Cleveland must have known that Graham had provided false or misleading information about his cooperation/immunity agreement; in fact, Strasser sent Cleveland a copy of his letter to Blau. Yet, in his June 26, 1996 affidavit, Cleveland declared that Patrick Graham "has never been known to provide false or misleading information" since he began cooperating with the government. Because Cleveland may have meant that Graham had not been known to provide false or misleading information to the government (Cleveland stated, in the preceding sentence, that Graham "ha[d] provided information to Special Agents of the FBI since April 30, 1996"), that declaration may not qualify as a deliberate falsehood, but it is certainly misleading. Cleveland knew that Graham was unreliable and that his mendacious conduct continued even after April 30. In assuring the magistrate that Graham had been truthful with the government for a two-month period, Cleveland suppressed that knowledge and created the false impression that Graham was, in fact, reliable.

As Brown's counsel argues, if the government had disclosed its knowledge concerning the dishonesty and bad character of Graham, the district court may have refused to sign the wiretap order or "requir[ed] the applicant to furnish additional testimony or documentary evidence in support of the application."[27] After all, "it is the magistrate who must determine independently whether there is probable cause . . . ."[28] "He may question the affiant, or summon other persons to give testimony at the warrant proceeding."[29] Much of the information contained in the affidavit, particularly the allegations concerning the genesis of the extortion scheme, was based on the

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[27] 18 U.S.C. § 2518(2).

[28] Franks v. Delaware, 438 U.S. 154, 165 (1978).

[29] Id. at 166.

uncorroborated statements of Graham. If the issuing judge gave credence to those statements, he did so in reliance on the false impression that Graham was reliable. Thus, to prevent the affidavit from being misleading, Cleveland should have advised the issuing judge that Patrick Graham was untrustworthy and that the government did not believe his uncorroborated statements. The omission of this information from the affidavit reflects intentional misconduct or, at the very least, a "reckless disregard for the truth."[30]

Brown also alleges that Cleveland misrepresented the content of the consensually recorded conversations. There is a substantial showing to this effect with respect to one important segment of the May 8, 1996 conversation between Graham and Brown. In paragraph 30 of the affidavit, Cleveland recites the following from that conversation:

> GRAHAM: . . . Ah, I want EDWIN to be comfortable, okay? I can't afford anything to go wrong with this deal. All right? So we've got to get him, whatever that portion is covered first. . .
>
> BROWN: YEAH.[31]

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[30] Id. at 155.

[31] Def.'s Mot. Suppress Ex. 5-B, Cleveland Aff. ¶ 30.

This recitation, a product of the government's calculated editing, presents the excerpt as an acknowledgment by Brown that Edwin Edwards would receive a portion of the payment that Brown was seeking from Graham and his partners. In the actual conversation, however, Brown conveyed a much different message. As indicated by the ellipsis mark, Cleveland omitted the statement and question immediately preceding Brown's affirmative response:

> GRAHAM: . . . Ah, I want EDWIN to be comfortable, okay? I can't afford anything to go wrong on this deal. All right? So we've got to get him, whatever that portion is covered first. All I want to do is drag you out and I'm not gonna drag you out more than 90 days on yours. Okay?
>
> BROWN: Yeah.[32]

Thus, it appears more likely that Brown was responding to the latter question pertaining to a delay in his payment rather than Graham's first question regarding his (Graham's) desire to make "EDWIN" comfortable. More importantly, Cleveland did not inform Judge Walter as to the very next words spoken by Brown,

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[32] Def.'s Mot. Suppress Ex. 7, 5/8/96 Tr. at 3.

which contain a flat denial that any money was going to Edwards:

> GRAHAM: I just don't . . . ah, you know, you never have told me what the . . . the . . . the sharing ratio is.
>
> BROWN: He doesn't get any. I get it all. I want half right away.[33]

During the remainder of their conversation that day, Graham made several other attempts to secure Brown's acknowledgment that Edwards would be receiving a share of the extortion proceeds. In my opinion, Brown's subsequent inconsistent and ambiguous responses failed to provide an adequate basis for reaching such a conclusion as a matter of probable cause, as opposed to a mere suspicion. Although analyzing the recorded conversations to determine Edwards's probable role is ultimately unnecessary to a disposition of Brown's appeal, I conclude that the Cleveland affidavit omitted the facts of Brown's flat denial of the existence of an Edwards portion and Graham's other unsuccessful efforts with reckless disregard for the truth and for the omissions' tendency to mislead the magistrate. By burying this information and offering, in corroboration of Graham's story, an excerpt that was misleadingly edited and taken out of context, the government tried to make the probable cause determination appear uncomplicated. The government should have afforded Judge Walter the opportunity to interpret and weigh Brown's denial and

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[33] Id.

his ambiguous statements within the context of the entire conversation rather than misrepresenting a single excerpt in order to compel the court to decide in its favor.

For the foregoing reasons, I conclude that Brown satisfied the first prong of the Franks test by making a substantial preliminary showing that the government intentionally or recklessly omitted facts from the warrant affidavit, causing the information actually reported to be misleading.

Turning to the second prong of Franks, Brown is not constitutionally entitled to a hearing unless he shows that the omissions are material.[34] "Identifying intentional omissions and misstatements is not enough . . . ."[35] Our inquiry, then, is whether the reconstructed affidavit establishes probable cause to believe that Brown had committed or was committing a crime.[36] We reconstruct the Cleveland affidavit by supplying the omissions and setting aside all of Graham's allegations that are not

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[34] United States v. Meling, 47 F.3d 1546, 1554 (9th Cir. 1995).

[35] Id.

[36] United States v. Bankston, 182 F.3d 296, 305û06 (5th Cir. 1999), rev'd in part on other grounds, Cleveland v. United States, 531 U.S. 12 (2000). See also United States v. Stanert, 762 F.2d 775, 782 (9th Cir. 1985) ("Standing alone, [a defendant's] substantial preliminary showing that the affidavit contained reckless or deliberate falsities and omissions is insufficient to warrant a Franks hearing. A defendant challenging an affidavit must also show that the affidavit purged of those falsities and supplemented by the omissions would not be sufficient to support a finding of probable cause.").

independently corroborated.[37] Because there remains sufficient content in the corrected affidavit to support a finding of probable cause, the district court's judgment must be affirmed.

The Hobbs Act makes it a crime for anyone to obstruct, or attempt to obstruct, commerce by extortion.[38] "The term 'extortion' means the obtaining of [(or attempting to obtain)] property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear . . . ."[39] "Extortion by wrongful use of fear includes fear of economic harm."[40] The excerpts from and summaries of the consensually recorded conversations that would appear in the corrected affidavit provide independent corroboration for the following aspects of Graham's story: (1) Cecil Brown was attempting to obtain property (money) from Graham and his associates with their consent;[41] (2) Brown threatened Graham and his associates with economic loss; and (3) Graham's group took the threats

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[37] See Bankston, 182 F.3d at 305; Stanert, 762 F.2d at 782.

[38] See 18 U.S.C. § 1951(a).

[39] Id. § 1951(b)(2).

[40] United States v. Tomblin, 46 F.3d 1369, 1384 (5th Cir. 1995).

[41] Graham was a Texas citizen representing a Texas corporation, Viewpoint Development Corporation, that had an interest in a private prison project in Louisiana; thus, the "effect on interstate commerce" element of the Hobbs Act was undoubtedly satisfied. See United States v. Villafranca, 260 F.3d 374, 377 (5th Cir. 2001) (stating that the "the Hobbs Act's required effect on interstate commerce is identical with the requirements of federal satisfied. jurisdiction under the Commerce Clause").

seriously, and it was reasonable for them to do so, because of Brown's close relationship with Edwin Edwards. For example, in a June 7, 1996 conversation, which is recounted in the affidavit, Brown warned Graham that he should be receiving a call from the Secretary of the Louisiana Department of Corrections. I agree with Judge Jones that "the import of this threat is clear: The Louisiana Department of Corrections could delay the Jena prison project; and if Graham and his partners wanted their sale to proceed as planned, they should consider increasing the money paid directly to Brown."[42] Moreover, the reconstructed affidavit, taken as a whole, would supply reasonable grounds for believing that Graham and his group feared that Brown would make good on his threats to delay the project if he did not receive a satisfactory amount of money. Put differently, the content remaining in the affidavit would establish probable cause to believe that Brown had committed, was committing, or was about to commit a Hobbs Act violation. Because a valid wiretap order could issue on the basis of the reconstructed affidavit, "no hearing is required" under Franks.[43]

In conclusion, Brown's offer of proof convinces me that the government knew Patrick Graham was untrustworthy at the time it applied for the wiretap order. It is also evident that the government carefully crafted its application, omitting its assessment of Graham's credibility as well as key facts concerning his misdeeds, in an effort to prevent Judge Walter from reaching a similar view on the issue of Graham's trustworthiness. Furthermore, through intentional or reckless omission, the Cleveland affidavit misrepresented the corroborative strength of at least one excerpt from the recorded conversations. Such conduct falls short of the ethical standards that the government should observe when it seeks authorization

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[42] Op. at 21-22.

[43] Franks v. Delaware, 438 U.S. 154, 172 (1978).

to intrude so profoundly on the privacy of its citizens. But these findings are of no benefit to Brown under the Franks standard because he failed to show that the reconstructed affidavit is not sufficient to support a finding of probable cause. Perhaps identifying false statements and deliberate or reckless omissions by an affiant that tend to mislead an issuing judge should be enough to entitle a criminal defendant to an evidentiary hearing on a motion to suppress, but the Supreme Court has determined otherwise. Under the rigid test established in Franks, the district court properly denied Brown's request.

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No. 02-0927

IN THE SUPREME COURT OF THE UNITED STATES

EDWIN EDWARDS AND STEPHEN EDWARDS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS' PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Sixth Amendment right to an impartial, unanimous verdict is violated when a court, after extensive inquiry during the deliberations themselves, dismisses a juror who it knows to be leaning towards acquittal, despite the possibility that the juror's dismissal has been sought (and ultimately granted) because of his views of the evidence.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

REASONS FOR GRANTING THE WRIT 2

I. THE *BROWN*, *THOMAS*, AND *SYMINGTON* STANDARD FOR INVESTIGATION AND REMOVAL OF A DELIBERATING JUROR 3

II. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH *BROWN*, *THOMAS*, AND *SYMINGTON* AND UNDERSCORES THE NEED FOR CLARIFICATION OF THE STANDARD FOR INVESTIGATING AND REMOVING JURORS DURING DELIBERATIONS 6

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

Brasfield v. United States,
272 U.S. 448 (1926) 6

People v. Cleveland,
21 P.3d 1225 (Cal. 2001) 2, 4

Tanner v. United States,
483 U.S. 107 (1987) 3

United States v. Abbell, 271 F.3d 1286 (11th Cir. 2001),
cert. denied, 123 S. Ct. 74 (2002) 2, 5

United States v. Baker,
262 F.3d 124 (2d Cir. 2001) 2, 6

United States v. Brown,
823 F.2d 591 (D.C. Cir. 1987) 2, 3, 4, 5, 6, 7

United States v. Prosperi,
201 F.3d 1335 (11th Cir. 2000) 3

United States v. Samet, 207 F. Supp. 2d 269
(S.D.N.Y. 2002) 6

United States v. Symington,
195 F.3d 1080 (9th Cir. 1999) 2, 4, 6

United States v. Thomas,
116 F.3d 606 (2d Cir. 1997) 2, 3, 4, 5, 6, 7, 8

CONSTITUTION AND RULES

U.S. Const. Amend. VI ..... *passim*

Fed. R. Crim. P. 23(b) 3, 5

Fed. R. Evid. 606(b) 3

Sup. Ct. R. 37.2(a) 1

Sup. Ct. R. 37.6 1

OTHER AUTHORITIES

Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 Nw. U. L. Rev. 877 (1999) 7, 8

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS' PETITION FOR A WRIT OF CERTIORARI

This *amicus curiae* brief is submitted in support of the petition for a writ of certiorari filed by petitioners Edwin Edwards and Stephen Edwards. The consents of the parties are submitted with the brief in accordance with Sup. Ct. R. 37.2(a).[1/]

INTEREST OF *AMICUS CURIAE*

The NACDL is a District of Columbia non-profit organization whose membership is comprised of over 10,000 lawyers and 28,000 affiliate members representing every state. The NACDL was founded in 1958 to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL members serve in positions bringing them into daily contact with the criminal justice system in the state and federal courts.

The NACDL is the only national bar organization working on behalf of public and private criminal defense lawyers. The American Bar Association recognizes the NACDL as an affiliated organization and awards it full representation in the ABA House of Delegates. The NACDL is dedicated to the preservation and improvement of our adversary system of justice.

[1/] As required by Rule 37.6 of this Court, *amicus curiae* submits the following statement: no party authored this brief in whole or in part; and no person or entity, other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

The NACDL rarely participates as *amicus* at the petition stage. It does so in this case--as it did in *United States v. Abbell*, 271 F.3d 1286 (11th Cir. 2001), *cert. denied*, 123 S. Ct. 74 (2002), which involved substantially the same question--because the issue presented has transcendent and recurring importance, and because, in our judgment, the court of appeals' decision threatens to undermine the crucial protections of the Sixth Amendment right to trial by jury and to invite trial courts to invade the secrecy of jury deliberations. We believe that the perspective of our members, who regularly represent criminal defendants in federal and state trial courts, will be useful to the Court.

REASONS FOR GRANTING THE WRIT

The Court should grant the writ of certiorari because the court of appeals' decision demonstrates the need for clear limits on a district court's power to investigate alleged juror misconduct, in the middle of jury deliberations, based on allegations from one faction of jurors that another juror--typically a holdout--will not deliberate.

Some courts in these circumstances have refused to sanction such investigations unless a stringent evidentiary threshold has been satisfied. *See, e.g., United States* v. *Symington*, 195 F.3d 1080 (9th Cir. 1999); *United States* v. *Thomas*, 116 F.3d 606 (2d Cir. 1997); *United States* v. *Brown*, 823 F.2d 591 (D.C. Cir. 1987). Other courts, by contrast--including *Abbell* and the court of appeals in this case--have granted district courts substantial and, in our view, unwarranted leeway to conduct investigations of deliberating jurors. *See, e.g., United States v. Baker*, 262 F.3d 124, 129-32 (2d Cir. 2001); *People v. Cleveland*, 21 P.3d 1225 (Cal. 2001). The Court should take this opportunity to establish clear and strict standards that must be satisfied before a district court may undertake such an investigation.

I. THE *BROWN*, *THOMAS*, AND *SYMINGTON* STANDARD FOR INVESTIGATION AND REMOVAL OF A DELIBERATING JUROR.

An investigation into the inner workings of a deliberating jury conflicts squarely with the principle--manifested, for example, in Fed. R. Evid. 606(b)--that jury deliberations must remain secret. Courts have recognized that "[o]nce a jury retires to the deliberation room, the presiding judge's duty to dismiss jurors for misconduct comes into conflict with a duty that is equally, if not more, important--safeguarding the secrecy of jury deliberations." *Thomas*, 116 F.3d at 618.

The Second Circuit declared in *Thomas* that "[t]he secrecy of deliberations is the cornerstone of the modern Anglo-American jury system." *Id.* The assurance that juries deliberate in secret, immune from inquiry by the court or the parties, promotes free, open, and candid debate among the jurors. *See, e.g., Tanner* v. *United States*, 483 U.S. 107, 124 (1987) ("[C]ommon fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just verdicts.") (quoting legislative history of Rule 606(b)). Indeed, a trial court may "invite[] reversible error" when it investigates "internal influence occurring during deliberations." *United States* v. *Prosperi*, 201 F.3d 1335, 1340-41 (11th Cir. 2000) (citing Fed. R. Evid. 606(b)).

Judicial intrusion into deliberations presents two principal dangers. First, "if trial judges were permitted to inquire into the reasoning behind jurors' views of pending cases, 'it would invite trial judges to second-guess and influence the work of the jury.'" *Symington*, 195 F.3d at 1086 (quoting *Thomas*, 116 F.3d at 620); *see, e.g., Cleveland*, 21 P.3d at 1231 ("Jurors may be particularly reluctant to express themselves freely in the jury room if their mental processes are subject to immediate judicial scrutiny. The

very act of questioning deliberating jurors about the content of their deliberations could affect those deliberations."). Second, "a trial judge's examination of jury deliberations risks exposing those deliberations to public scrutiny. Such exposure, in turn, would jeopardize the integrity of the deliberative process." *Symington*, 195 F.3d at 1086.

The *Brown*, *Thomas*, and *Symington* courts assigned such great weight to the value of secret deliberations that they adopted an evidentiary standard designed expressly to protect the sanctity of the jury room. Those courts held that "if the record evidence discloses *any possibility* that the request to discharge stems from the juror's view of the sufficiency of the government's evidence, the court must deny the request." *Thomas*, 116 F.3d at 621-22 (emphasis added); *see Brown*, 823 F.2d at 596 (same); *cf. Symington*, 195 F.3d at 1087 ("any reasonable possibility"). Under the "any possibility" standard, "[a] presiding judge faced with anything but unambiguous evidence that a juror refuses to apply the law as instructed need go no further in his investigation of the alleged nullification; in such circumstances, the juror is not subject to dismissal on the basis of his alleged refusal to follow the court's instructions." *Thomas*, 116 F.3d at 622.

As this language suggests, the *Brown/Thomas* standard serves two functions. First, it establishes an evidentiary threshold that must be crossed before the district court can investigate a claim of nullification or refusal to deliberate; that is, the court may not undertake an inquiry as long as there is "any possibility" that a complaint about a juror stems from his view of the evidence. *See id.*; *see also Symington*, 195 F.3d at 1087 (when there is any reasonable possibility that the impetus for dismissal stems from the juror's views on the merits of the case, "the trial judge has only two options: send the jury back to continue deliberating or declare a mistrial"). As *Thomas* observes, the "any possibility" standard "protects not only against the wrongful removal of jurors; it also

serves to protect against overly intrusive judicial inquiries into the substance of the jury's deliberations." 116 F.3d at 622. Second, *Brown* and *Thomas* establish a substantive rule for determining when a juror may be dismissed under Rule 23(b) for nullification; dismissal may occur only when there is no possibility that the complaints about a juror's conduct result from his position on the merits.

This case--like *Abbell* and other recent cases--illustrates the dangers that the *Brown/Thomas* standard serves to prevent. After six days of deliberations, some jurors accused Juror 68 of being "biased" and "refus[ing] to participate in deliberations." Principally on the basis of this allegation, the district court launched a highly intrusive inquiry that interrupted deliberations and included four interviews of the foreman, repeated interviews of Juror 68, and interviews of a number of other jurors. This inquiry, triggered by the allegation of bias, inevitably signalled to the other jurors that the district court found Juror 68's firmly held view of the evidence somehow suspect. The district court's investigation ultimately produced "evidence" of entirely trivial violations of the court's instructions, which then served as the ostensible basis for dismissing the juror. Such an extraordinarily intrusive investigation inevitably "bring[s] to bear in some degree, serious, although not measurable, an improper influence upon the jury, from whose deliberations every consideration other than that of the evidence and the law as expounded in a proper charge, should be excluded." *Brasfield* v. *United States*, 272 U.S. 448, 450 (1926).

II. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH *BROWN*, *THOMAS*, AND *SYMINGTON* AND UNDERSCORES THE NEED FOR CLARIFICATION OF THE STANDARD FOR INVESTIGATING AND REMOVING JURORS DURING DELIBERATIONS.

The Fifth Circuit's decision conflicts with *Brown*, *Thomas*, and *Symington* and substantially weakens the protections they afford the Sixth Amendment jury trial right. The decision--particularly in conjunction with the Eleventh Circuit's recent decision in *Abbell*--underscores the need for this Court to clarify the standard for investigating and removing deliberating jurors.

The Fifth Circuit disregarded the holding of *Brown*, *Thomas*, and *Symington* that the district court may not initiate an investigation during deliberations when the complaint about a juror potentially rests on his view of the evidence. App. 47-48. The note that the district court received from the foreman on May 1 clearly raised that possibility; the note asserted, for example, that Juror 68 "is biased"and "has his mind made up." Under *Brown*, *Thomas*, and *Symington*, therefore, that note did not permit the district court to undertake further investigation. The district court's questioning of the foreperson--which then led to its "investigation" of Juror 68's alleged violation of the court's instructions--cannot be sustained under the *Brown/Thomas* standard, and the court of appeals' approval of that investigation conflicts squarely with those decisions.

The Fifth Circuit effectively turned the *Brown/Thomas* standard on its head; the court cited the "ambiguous" nature of the foreman's bias allegation as a reason to *proceed* with the investigation. App. 48. But *Brown*, *Thomas*, and *Symington* make clear that when an allegation against a deliberating juror is ambiguous--when there is "any possibility" that the allegation rests

on the juror's view of the evidence--then the district court cannot inquire further. At that point, the court "has only two options: send the jury back to continue deliberating or declare a mistrial." *Symington*, 195 F.3d at 1087. By resolving ambiguity in favor of investigation, contrary to *Brown*, *Thomas*, and *Symington*, the Fifth Circuit overlooked the trial court's "equally, if not more, important [duty]--safeguarding the secrecy of jury deliberations." *Thomas*, 116 F.3d at 618. The district court's interrogation of the foreman, Juror 68, and ultimately the remaining jurors improperly exposed the jury's deliberations to scrutiny.[2/]

The Fifth Circuit here--like the Eleventh Circuit in *Abbell* and the California Supreme Court in *Cleveland*-- underestimated the dangers that an investigation of juror misconduct presents during deliberations when there is any possibility that the inquiry stems from the juror's view of the evidence. If the trial court has the discretion to launch an inquiry into alleged bias and refusal to deliberate--as the district court did here--"the threat of an interview

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[2/] The Fifth Circuit declined to apply the *Brown/Thomas* substantive standard for removing jurors on the basis that those decisions merely restrict dismissals of jurors based on nullification. App. 44-46. In *Baker*, a panel of the Second Circuit similarly attempted to distinguish *Thomas* on the basis that it involved nullification, while *Baker* considered a "refusal to engage in the process of jury deliberation." 262 F.3d at 132. But a recent district court decision illustrates the impossibility of distinguishing between nullification on one hand and a purported refusal to deliberate on the other. *See United States v. Samet*, 207 F. Supp. 2d 269 (S.D.N.Y. 2002); *see also Symington*, 195 F.3d at 1085-87 (analyzing removal of juror for refusal or inability to deliberate under the *Brown/Thomas* standard). In this respect as well, this Court's clarification is needed.

with the judge could be used by those jurors who seek to convince a holdout to go along with the majority's position." Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 Nw. U. L. Rev. 877, 950 (1999). The possibility of such an interview may also chill deliberations; jurors--particularly those in the minority--will be reluctant to state their views for fear that the majority will report their words to the court as evidence of bias or a refusal to consider the views of other jurors. *See id.* And an inquiry by the court into the basis for a particular juror's views, no matter how delicate, inevitably will convey to the jury that the court disapproves of those views. The remaining jurors--who know the position of the juror under investigation--may well conclude that the court finds that position unreasonable. Such a conclusion would have a powerful impact on the jury, and particularly on any other holdout jurors.

Apart from deepening the circuit split over the proper standard for initiating an investigation of a deliberating jury, the court of appeals' decision represents unwise policy. The institutional pressure on trial judges to complete cases and move their dockets provides a powerful incentive for a court faced with an ambiguous record to seize upon any basis to investigate and remove a holdout juror. *See id.* at 951. This case illustrates that pressure. After a lengthy trial and prolonged deliberations, the district court launched an investigation based on a juror's asserted bias and failure to deliberate and, when that allegation proved baseless, ultimately dismissed the juror based on alleged improprieties that are, by any objective standard, utterly trivial. To ensure protection of the defendant's constitutional and statutory right to a unanimous verdict in the face of these institutional pressures, the Court should take the opportunity to articulate strict limits on a district court's power to investigate alleged misconduct by a deliberating juror.

CONCLUSION

The petition for a writ of certiorari should be granted.

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